(17,647.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 533.

HENRY M. BAKER, PETITIONER,

vs.

HORACE S. CUMMINGS.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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In the Court of Appeals of the District of Columbia.

HORACE S. CUMMINGS, Appellant,
vs.
HENRY M. BAKER.
No. 898.

a Supreme Court of the District of Columbia.

HENRY M. BAKER
vs.
HORACE S. CUMMINGS.
No. 30197. At Law.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration, Notice to Plead, and Affidavit, &c.*

Filed Dec. 19, 1889.

In the Supreme Court of the District of Columbia, the 19th Day of December, 1889.

HENRY M. BAKER, Plaintiff,
vs.
HORACE S. CUMMINGS, Defendant.
No. 30197. At Law. Docket No. —.

1. The plaintiff sues the defendant for money payable by the defendant to the plaintiff for goods bargained and sold by the plaintiff to the defendant, and for goods sold and delivered by the plaintiff to the defendant, and for work done and materials provided by the plaintiff for the defendant at his request, and for money lent by the plaintiff to the defendant, and for money paid by the plaintiff for the defendant at his request, and for money received by the defendant for the use of the plaintiff, and for money found to be due from the defendant to the plaintiff on accounts stated between them.

And the plaintiff claims $2,712.81, with interest at the rate of 6 per cent. per annum from the 31st day of July, 1889, according to the particulars of demand hereto annexed, besides costs of this suit.

J. J. JOHNSON,
Attorney for Plaintiff.

2 The defendant is to plead hereto on or before the first day of the first special term of the court occurring twenty days after service hereof; otherwise judgment.

J. J. JOHNSON,
Attorney for Plaintiff.

Affidavit.

DISTRICT OF COLUMBIA, }
Washington City, } *To wit:*

Henry M. Baker, being duly sworn, swears that he is Henry M. Baker, the plaintiff named in the declaration to which this affidavit is attached; that the plaintiff's cause of action therein is as is stated in said declaration, and upon the account stated between the plaintiff and the defendant, upon a settlement of accounts between the plaintiff and the defendant, and upon said settlement and statement of the account the sum- mentioned in the particulars of demand were found to be due the plaintiff, and the plaintiff claims that sum to be due him by reason of said stated account, and that the sum of $2,712.81, with interest, as therein claimed, is justly due and owing to the plaintiff from the defendant by reason of the premises, exclusive of all set-offs and just grounds of defense.

HENRY M. BAKER.

Subscribed and sworn to before me this 19th day of Dec'r, 1889.

R. J. MEIGS, *Clerk,*
By L. P. WILLIAMS,
Ass't Clerk.

3 *Particulars of Demand.*

Filed Dec. 19, 1889.

Fees collected by Baker:

Jayne case	$999.75
John J. Curtis	801.75
Baltimore cases	408.99
Balto. "	173.96
New Orleans "	138.15
Mrtn. case	49.33
Crozier case	24.96
Palmer "	43.96
McMann's "	18.56
Phillips' "	9.03
Additional Alabama court fees	46.41
Doughty case	175.00
Two pension fees	25.00
Total fees collected	$2,914.85
Less fees paid Burrows	46.98
Total net fees	$2,867.87

4 Baker's cases in which Cummings collected and retained the fees:

Foggs case	$625.19
Briggs "	650.00
Pardus "	106.51
Additional Alabama court fees	102.83
Total	$1,484.53
Fees earned and received by Cummings, Hoboken case	5,806.00
Total fees collected by Cummings	$7,284.53
" " Baker	2,867.87
Excess collected by Cummings	$4,416.66
One-half due Baker	2,208.33
Expenses paid by Baker, as per book account	$1,243.17

Expenses paid by Cummings:

Office rent for May, June, July, and August, 1887; June & August, 1888, and April, 1889.	$210.00	
Copies in Jayne case	5.00	
Copying machine	15.00	
Paid in Huestis case	70.00	
" "	20.00	
" "	20.00	
" "	50.00	
Total paid by Cummings		390.00
Excess of expenses paid by Baker		$853.17
One-half due Baker		426.58

5 Due Baker from Cummings on person-account:

For Dartmouth dinner	$3.50	
" Law Reporter stock	50.00	
" fees McMann's case	55.67	
" " Palmer "	131.87	
" ½ proceeds Moscow band	360.00	
		$601.04

Due Cummings from Baker on personal account:

For Florida trip (1886)	$80.64	
" Republican	2.00	
" janitor	24.00	
" room rent from Oct. 1, 1884, to Aug. 31, 1889.	206.50	
" Denison interest	210.00	
		523.14
Balance due Baker		$77.90

Recapitulation.

Excess of fees received by Cummings....	$4,416.66	
One-half due Baker.....		$2,208.33
Excess of expenses paid by Baker....	$853.17	
One-half due Baker.....		426.58
Balance due Baker on personal account.		77.90
Total amount due Baker		$2,712.81

6 *Defendant's Pleas, Affidavit, &c.*

Filed Feb. 10, 1892.

In the Supreme Court of the District of Columbia.

HENRY M. BAKER
vs.
HORACE S. CUMMINGS. } At Law. No. 30197.

The defendant for plea to the first and all the other counts of the plaintiff's declaration says:

1. That he is not indebted as alleged.
2. That he never promised as alleged.
3. That the plaintiff's cause of action did not accrue within three years last past.
4. And for a further plea to said counts of said declaration the defendant says that the plaintiff at the commencement of this suit was and still is indebted to the defendant to the sum of $35,873.35 for money payable by the plaintiff to the defendant for goods bargained and sold by the defendant to the plaintiff, and for goods sold and delivered by the defendant to the plaintiff, and for work done and material provided by the defendant to the plaintiff at his request, and for money lent by the defendant to the plaintiff, and for money paid by the defendant to the plaintiff at his request, and for money received by the plaintiff for the use of the defendant, as appears by the particulars of demand hereunto annexed, and he is willing that the same may be set off against the plaintiff's demand, and that he may have judgment for the remainder.
5. And for a further plea to said counts of said declaration the defendant says that the plaintiff at the commencement of this
7 suit was and still is indebted to the sum of $35,873.35 for money had and received to the use of the defendant, as appears by the particulars of said debt annexed to the fourth plea above set fourth, and he is willing that the same may be set off against the plaintiff's demand, and defendant asks judgment for the balance which may be found due to him on the trial.

H. O. CLAUGHTON,
FRANKLIN H. MACKEY,
Att'ys for Def't.

Affidavit of Defense.

Horace S. Cummings, being duly sworn, says he is the defendant in this action, and that he denies the right of the plaintiff to the whole or any part of the sum claimed to be due to the plaintiff from affiant; that he denies that there ever was any account stated between him and the plaintiff, although he has repeatedly endeavored to obtain such an account; that the plaintiff and he were for many years prior to the 1st of September, 1889, partners in the practice of the law, which partnership was dissolved on or about the 1st day of September, 1889; that during the course of said partnership the plaintiff collected and received upon claims which had been successfully prosecuted against the United States in behalf of various persons by said partnership firm large sums of money, amounting in all, so far as affiant now knows, to $406,990.44, out of which sum the share of fees due affiant was $50,873.60, but that the plaintiff failed to pay over to affiant (or to account to him therefor) the sum of $35,873.85 of said fees, and the defendant says that
8 the said sum $35,873.85 is still due to him from the plaintiff and remains unpaid; that the bill of particulars annexed to the plea of set-off and filed in this suit contains a full statement of the names of the claimants whose claims were collected by the plaintiff for and on account of the partnership, as above set forth; the amounts collected and, as far as now known, the date when collected; and affiant makes the said bill of particulars a part of this affidavit as fully as if the same were here set out at length. Affiant therefore claims the said sum of $35,873.85 of the plaintiff as a set-off against his demand, and has so pleaded the same in this action.

And affiant further says that he denies that there is due by him to the plaintiff any of the sums set out in the bill of particulars filed with the plaintiff's declaration, but, on the contrary, says that on a full settlement of the accounts between the plaintiff and the affiant there will be found due to affiant, even after allowing the said sums, a much larger sum due by the plaintiff to affiant, as above set forth in this affidavit.

HORACE S. CUMMINGS.

Subscribed and sworn to before me this 9th day of February, 1892.

[SEAL.] J. ARTHUR LYNHAM,
U. S. Commissioner.

Particulars of Demand.

Accompanying plea of set-off.

9 List of drafts and amounts of same in payment — claims against the United States collected by the plaintiff, as one of the firm of Cummings & Baker, and which were delivered to said Baker as attorney, and out of which 25 per cent., or $101,747.20, was retained by said Baker as fees, one-half of which ($50,873.60) is due under their partnership agreement and still remains unpaid to the defendant, except the sum of $15,000.00—that is to say, the sum of $35,873.85.

Name of claimant.	Amount collected by H. M. Baker.
R. A. Bensel	$344 00
J. Q. A. Lothrop	180 50
Stephen Sharpe	1,560 04
Ethan Hammond	831 00
W. A. Forrester	2,691 19
S. B. Dickerson	104 00
E. S. Hamilton	1,253 80
B. D. Gifford	896 52
V. F. Hatch	2,379 23
S. S. Baker	421 00
Simeon Atwood	492 42
James Gifford	279 50
Silas Dickson	3,792 24
W. H. Biesel	4,720 01
J. L. Wallace	1,365 00
Alexander Maxwell	682 78
P. H. Ricker	682 78
David D. O'Dell	3,444 14
John M. Robertson	557 13
John T. Howard	64 30
Joseph Davis	64 30
10 E. S. Pettit	277 54
Asa Larned	315 50
Selden A. Jones	309 50
Frank Granger	78 00
Lawrence T. Remer	63 00
H. S. Ballentine	161 47
Stephen H. Avery	197 73
W. A. Woodward	474 03
James Bills	261 00
J. M. Jenks	413 71
Bela W. Jenks	432 00
Herbert C. Sanborn	337 16
James G. Waugh	680 89
Thomas E. Scott	1,131 16
William Williams	2,019 92

	Hiram M. Witherell	497 28
	James Mitchell	1,230 46
	Reuben Barton	423 00
	Edwin B. Low	47 70
	Samuel Comer	877 70
	John Albert Ladue	276 00
	Herrick E. Warren	1,535 26
	Charles Deal	1,347 46
	P. H. Shields	1,305 45
	Joseph Hardy	703 10
	Ferd. W. Guptill	3,606 09
	Erastus S. Mead	102 00
	Stoughton D. Mix	1,462 70
	Cornelius Bosworth	1,723 41
	D. W. Shurtliff	1,218 03
	T. O. Peck	3,389 75
11	Robert H. Percy	1,189 35
	J. L. Cline	1,998 40
	Fred Hebard	1,929 35
	F. M. Noble	1,358 50
	Abner Reed	1,290 00
	John Combs	1,082 60
	John D. Flint	1,047 00
	Will H. Rees	468 40
	Julius R. Morris	1,623 80
	Charles Luling	977 15
	Harry Griswold	3,138 92
	George B. Burnett	3,244 43
	Levi Trundy	1,657 93
	Asa Fish	4,180 83
	Almon S. Parmenter	166 44
	Homer W. Styron	4,276 64
	Israel B. Abbott	1,698 50
	Jeremiah Abbott	3,771 47
	Virgil A. Crawford	1,521 38
	Will F. Brown	1,599 37
	John Higgs	392 50
	David E. Morgan	363 30
	R. W. Beach	300 55
	C. R. Dannals	132 90
	Louis Cicotte	5,452 36
	Joseph H. Riggs	53 00
	Orson B. Curtis	160 50
	Wilber Howard	183 50
	John E. Nellis	927 77
	George King	674 64
	William L. Damon	183 50
	W. U. Thayer	533 49
12	George W. Comer	1,062 63
	W. H. Stoddard	4,719 70
	Lyman Stiles	1,710 00

James L. Kellogg	562 50
Archibald Campan	3,748 53
Virgil W. McGraw	392 50
D. Milo Heath	1,461 00
Otis Bradford	362 50
Joseph B. Hinchman	362 70
Daniel Cole	675 04
John S. Smith	1,461 00
Rudolph Kern	346 30
John Wood	1,645 36
David E. Johnson	1,849 61
Francis Hesse	732 03
Benjamin Bulger	3,672 67
Charles E. Bury	392 50
J. A. Riopelle	5,452 36
	$131,891 27

Continuation of Statement, Giving, in Addition, the Date when the Drafts Were Collected.

	Name of claimant.	Date when collected.	Amount claims collected.
	Adams, Barclay P.	February 18, 1888	$72.82
	Adams, Hasley H.	April 23, "	531.00
	Adams, B. P.	October 31, "	511.55
	Ashman, H. A.	" 31, "	122.00
	Abbe, Wm. A.	" 29, "	2,608.58
	Atkins, Wm. H.	" 30, "	1,881.14
	Alden, Wm. J., Jr.	" 30, "	4,148.52
13	Aiken, Charles E.	November 10, 1888	994.94
	Bain, John J., Jr.	February 21, "	106.07
	Bunker, Chas. S.	" 23, "	990.32
	Brown, N. H.	" 24, "	3,252.56
	Brooks, J. H.	" 25, "	649.07
	Brush, Geo. W.	" 24, "	202.50
	Bradford, John R.	" 21, "	290.70
	Bently, Chas. M.	" 25, "	479.35
	Bedell, Henry E.	" 27, "	547.84
	Brooks, Josiah R.	" 23, "	369.60
	Booth, C. M.	" 27, "	417.00
	Benedict, H. T.	" 28, "	202.50
	Bird, Peter C.	March 6, "	660.10
	Bailey, Kate	February 21, "	57.00
	Butler, Henry	April 23, "	3,063.37
	Bell, Edwin R.	" 21, "	1,662.32
	Blood, Slumon E.	" 24, "	1,723.41

Statement—Continued.

Name of claimant.	Date when collected.	Amount claims collected.
Butler, Abram G	April 25, 1888	$3,250.15
Blood, Fred. R	" 24, "	1,244.37
Blood, Calvin A	" 28, "	2,110.90
Brown, Henry M	May 5, "	2,479.64
Bean, Silas G	" 7, "	526.84
Barnard, John A	October 31, "	2,259.21
Beetle, Henry W	" 30, "	1,554.05
Barrett, Lewis M	November 12, "	3,193.70
Brelsford, R. H	" 8, "	1,719.44
Beetle, David T	" 14, "	3,698.53
Barthelow, Joseph	December 5, "	400.70
Butler, John H	March 21, 1889	907.71
Churchill, Charles O	February 23, 1888	1,552.94
14 Coe, Charles H	February 28, 1888	1,082.05
Coe, William A	" 27, "	462.82
Clemons, Hubbard M	April 21, "	3,490.57
Carpenter, Silas P	" 21, "	365.80
Cathcart, W. C	" 23, "	594.25
Cox, Allen M	" 20, "	1,398.12
Conklin, Joseph	May 1, "	46.50
Crowell, M. B	June 20, "	1,335.00
Clark, Frank D	November 7, "	916.48
Crozer, James A	" 7, "	286.20
Casey, Robert E	" 7, "	64.30
Coe, Wm. B	" 12, "	549.00
Calligan, Samuel H	" 28, "	4,461.00
Cochran, John	December 14, "	94.28
Call, Henry	March 22, 1889	687.00
Durfee, Wm. R	February 23, 1888	1,867.87
Dean, Herbert H	" 23, "	2,328.83
De Costa, Nathan	" 18, "	724.41
Delamene, Charles	April 23, "	1,498.67
Davis, Geo. W	" 24, "	1,723.41
Dominguez, Mary C	April 26, "	91.50
Drew, Theodore C	November 7, "	4,458.89
Dodge, Adrian C	" 7, "	91.50
Dearborn, Benjamin C	March 25, 1889	207.00
Ellsworth, Albert	March 7, 1888	382.84
Follett, Dwight A	February 20, "	933.33
Fleury, Allen S	" 25, "	174.00

Statement—Continued.

	Name of claimant.	Date when collected.	Amount claims collected.
	Fisk, Edward W	April 25, 1888	$1,919.43
	Ferris, Gennie	" 27, "	91.50
15	Ferguson, Frank A	April 17, 1888	2,382.51
	Frost, Charles	November 7, "	497.90
	Field, Joseph F	" 7, "	404.29
	Fleshiem, Joseph	" 5, "	367.94
	Fiefield, Samuel S	" 7, "	749.65
	Fleury, Allen S	March 27, 1889	1,028.55
	Gibbs, William H	February 24, 1888	1,295.32
	Green, Andrew	March 3, "	239.23
	Glennie, Minerva H	" 20, "	421.78
	Garvin, W. S	April 23, "	1,989.28
	Green, Edward H	" 24, "	2,561.70
	Goldsmith, L	" 23, "	1,662.09
	Glennie, M. H	April 26, "	2,030.33
	Gregory, George H	" 28, "	2,525.50
	Gladding, Dan. W	November 6, "	4,735.98
	Gilbert, Lucius	" 10, "	5,854.73
	Gram, John C	" 6, "	360.00
	Grady, John E	March 23, 1889	403.67
	Harris, Edward H	February 23, 1888	3,738.82
	Holmes, Albert B	" 23, "	509.96
	Holden, F. M	" 24, "	800.00
	Hayward, A. C	" 25, "	2,028.61
	Hooper, Matthew	" 21, "	621.30
	Hazen, Ezra	" 29, "	2,191.50
	Hamlin, Joseph E	April 23, "	532.04
	Hopkins, Stephen D	" 17, "	507.00
	House, H. A	" 28, "	84.00
	Hosking, Will. A., Jr	March 24, "	86.70
	Hopkins, Annie M	April 21, "	1,585.47
16	Hooke, Fred. A	April 23, 1888	661.50
	Haynes, J. W	" 21, "	207.00
	Huntington, D. H	" 21, "	1,904.03
	Hartwich, Louis M	" 24, "	783.38
	Hurd, Bradford C	April 3, "	246.00
	Hungerford, N. L	" 26, "	158.60
	Harris, Ed. B	November 7, "	789.45
	Hagar, Charles L	" 7, "	60.00
	Hall, Sylvanus W	" 7, "	1,443.74
	Holmes, Stephen	" 6, "	1,289.13
	Hurst, Thomas	November 12, "	2,127.00

Statement—Continued.

Name of claimant.	Date when collected.	Amount claims collected.
Hooker, Leonora	November 13, 1888	$585.04
Hill, Martha J	" 13, "	106.63
Holmes, Jonathan H	" 12, "	2,126.70
Hagerty, James S	March 22, 1889	1,448.07
Jenks, Bela W	April 23, 1888	2,501.50
Johnson, J. M	" 24, "	1,094.07
Johnston, Charles	" 26, "	2,263.65
Jones, T. H	" 28, "	2,810.76
Jennings, Harriet E	November 8, "	5,663.68
Johnson, Samuel C	" 12, "	3,547.05
Koch, F. H	February 24, "	343.33
Keeler, Anna E	" 21, "	2,108.45
Kelley, B. F	April 20, "	192.00
Krebs, George J	" 21, "	940.32
Kingsbury, G. P	" 24, "	1,462.87
Kidd, Andrew J	" 24, "	2,256.30
Limoge, Calice	February 27, 1888	1,569.37
Lowen, Caroline M	" 25, "	4,316.68
17 Laduke, Chas. E	February 25, 1888	477.00
Lasley, S. H	April 24, 1888	2,484.00
Lester, George H	" 24, "	990.33
Lampman, M. H	" 28, "	2,810.76
Lee, Wm. G	March 22, 1889	699.66
Lander, Peter	" 23, "	711.00
Moffatt, James	February 23, 1888	1,453.10
McKay, John A	March 1, "	609.24
Matthews, George	April 23, "	190.00
Merrell, George C	" 23, "	201.00
Mason, Wm. P., Jr	" 21, "	357.00
Martin, Nathan K	" 21, "	202.50
McConnelly, T. C	" 21, "	3,902.92
McBride, George W	" 25, "	1,079.23
Millington, Lucy A	" 24, "	63.00
McGown, Delia A	May 17, "	1,324.50
Miller, Benj. F	October 31, "	1,447.50
McKinstry, W. D	November 7, "	15.00
Medicis, E. J. de	" 6, "	2,605.73
Miller, Elizabeth	" 9, "	1,567.50
Moore, Benj. C	" 7, "	155.00
Moore, Hannah M	" 9, "	172.08

Statement—Continued.

	Name of claimant.	Date when collected.	Amount claims collected.
	McGarvy, Noah S.	November 12, 1888	8987.00
	Morris, Chas. H., ex'r	March 25, 1889	2,699.33
	Morris, Albert, ex'r	" 26, "	2,699.33
	Newton, S. H.	April 21, 1888	63.07
	Nims, Chas. S.	" 24, "	3,238.34
	O'Kearney, Alicia B.	" 25, "	91.50
	Oliver, W. W.	March 23, 1889	769.58
18	Penniman, L. L.	February 27, 1888	501.00
	Palmer, Amanda F.	March 5, "	191.50
	Parmenter, H. H.	April 20, "	143.58
	Potter, James J.	" 24, "	1,636.50
	Post, Henry D.	November 7, "	2,272.81
	Predmore, Benj.	" 10, "	1,015.32
	Pettingill, H. B.	November 12, 1888	411.00
	Paine, Philip H.	March 25, 1889	1,682.93
	Rand, Wm. H.	February 25, 1888	1,233.00
	Reed, A. A.	" 27, "	120.00
	Rounds, H. H.	" 27, "	969.00
	Robinson, O. W.	" 27, "	122.00
	Raiford, Fanny J.	March 3, "	439.20
	Rieg, John P.	April 19, "	1,912.47
	Rice, Milo L.	" 21, "	645.69
	Robinson, Nathaniel	" 23, "	1,095.85
	Reynolds, J. G.	November 10, "	120.97
	Riford, S. B. & H. B.	" 12, "	1,436.03
	Ripley, Lucy A.	December 31, "	1,122.00
	Ramsdell, T. J.	March 23, 1889	2,406.87
	Ricard, Mary	" 23, "	1,411.76
	Smith, N. S.	February 21, 1888	4,125.70
	Starr, Thomas H.	" 28, "	648.90
	Sweeny, Catherine	" 24, "	2,099.00
	Story, Solomon J.	" 25, "	420.00
	Schuyler, John N.	" 25, "	625.25
	Stewart, A. E.	" 20, "	186.00
	Spaulding, J. S.	March 10, "	609.00
	Sowles, Geo. D.	" 1, "	549.66
	Sylvester, Joseph W	April 21, "	3,625.07
19	Skarren, Louis A.	April 17, 1888	541.00
	Stewart, Wm. E.	" 25, "	1,532.15

Statement—Continued.

Name of claimant.	Date when collected.	Amount claims collected.
Scofield, Geo. E.	November 7, 1888	$4,071.47
Shortle, Henry.	" 5, "	945.75
Sackrider, Geo. M.	" 7, "	582.49
Smith, A. W.	" 8, "	1,430.63
Smith, Rebecca	" 12, "	5,720.89
Smith, Lyman H.	" 12, "	67.50
Small, John H.	" 22, "	993.00
Singer, Sarah N.	March 21, 1889	1,035.00
Starkweather, J. H.	" 21, "	188.70
Smith, James B.	" 21, "	2,007.82
Smith, James B.	" 21, "	771.40
Starkweather, J. H.	" 21, "	496.22
Teft, Wm. H.	February 22, 1888	1,355.50
Thompson, Benj. W.	April 21, "	93.00
Tyler, Chas. B.	" 21, "	2,623.50
Tuller, Will H.	" 24, "	2,301.00
Thompson, John D.	November 9, "	312 96
Tilton, John H.	" 10, "	912.13
Thomas, Edward A.	March 22, 1889	148.32
Usher, Thomas T.	October 31, 1888	744.00
Wells, Charles	February 23, 1888	84.00
Witsell, Francis E.	" 24, "	1,427.50
Wood, Seymour M.	" 25, "	165.00
Wallace, Samuel J.	" 21, "	762.75
Wright, Maria E.	March 26, "	183.00
Woodbury, Wm. H.	April 23, "	310.50
Wilkinson, Edwin	" 21, "	248.37
Waltz, Lizzie M.	November 5, "	450.27
20 Wright, John E.	November 7, 1888	272.00
Wright, Edward L.	" 6, "	1,151.11
Wilkes, Charles T.	" 5, "	1,461.65
Wells, Remos.	" 7, "	156.15
Welsh, David C.	March 23, 1889	1,459.05
Yost, John C.	November 13, 1888	292.50
		$275,099.58
Add amount as per 1st statement		131,891.27
Total drafts collected		$406,990.85

Joinder of Issue on Defendant's Pleas, &c.

Filed Aug. 24, 1892.

In the Supreme Court of the District of Columbia.

HENRY M. BAKER
vs.
HORACE S. CUMMINGS. } At Law. No. 30197.

The plaintiff joins issue upon defendant's pleas,

J. J. JOHNSON,
For Plaintiff.

Aug. 1, 1892.

Last pleading filed this day.

J. J. JOHNSON,
For Plaintiff.

To the clerk, John M. Young.

21 *Affidavit of Plaintiff Praying Leave to File Several Replications.*

Filed Jun- 16, 1898.

In the Supreme Court of the District of Columbia.

HENRY M. BAKER, Plaintiff,
vs.
HORACE S. CUMMINGS, Defendant. } No. 30197. Law.

DISTRICT OF COLUMBIA, *ss:*

Henry M. Baker upon oath says that he instituted suit herein on the 19th day of September, 1889, to recover the sum of $2,712.87, with interest, due him by the defendant; that thereafter, to wit, on the 1st day of February, 1890, and before plea was due, the defendant filed a bill in equity, on the equity side of the supreme court of the District of Columbia, to restrain further proceedings in said lawsuit; that thereafter, to wit*h*, on the 29th day of January, 1892, the injunction restraining the further prosecution of said lawsuit was dissolved; that on the 10th day of February, 1892, pleas were filed by the defendant—among them two counts or pleas in set-off—whereby the defendant sought to recover from affiant approximately the sum of $35,000; that thereafter, to wit, on the 24th day of August, 1892, J. J. Johnson, since deceased, then attorney for affiant, joined issue upon such of the pleas of the defendant as tendered issue, and, as affiant is advised, filed no pleas to the said several counts of set-offs;

22 that thereafter, as all of the several matters and items embraced in the particulars of set-off annexed to said pleas of set-off were embraced and covered by said equity cause by consent, the proceedings in said law cause were suspended until the determination of said equity cause; that such proceedings were had in said

equity cause that, by decree of the Supreme Court of the United States on the 21st day of February, 1898, said equity cause was dismissed with costs, thereby rendering *res adjudicata* the several matters and things set forth in several pleas or counts in set-off. Affiant is advised at common law, strictly speaking, there could not be more than one replication to plea, yet the pleas in set-off filed by the defendant herein are in fact cross-actions seeking to recover from affiant an amount largely in excess of the amount claimed in his declaration, and, while he is further advised and believes he has a legal right to file as many replications thereto as the defendant had to file pleas to the declaration, nevertheless, as the right to file several replications under the rules of this court now rests in the discretion of the court, in order to remove any doubt upon the subject affiant prays the court to grant him leave to file the several pleas or replications herewith submitted — the said several pleas or counts in set-off filed by the defendant.

HENRY M. BAKER.

Subscribed and sworn to before me this 15th day of June, A. D. 1898.

[SEAL.] F. WALTER BRANDENBURG, JR.,
Notary Public, D. C.

23 *Replication of Plaintiff.*

Filed Jun- 16, 1898.

In the Supreme Court of the District of Columbia.

HENRY M. BAKER, Plaintiff,
vs.
HORACE S. CUMMINGS, Defendant. } No. 30197. Law.

Now comes the plaintiff, by his attorney, with leave of the court first had and obtained, — for replication to the defendant's fourth and fifth pleas and each of them, the same being pleas of set-off, says:

First. That he never promised as alleged.

Second. That the said supposed causes of action or claims of said defendant in said plea of set-off did not accrue, nor did any of them accrue, to the said defendant at any time within three years next before the filing of said plea, in manner and form as the said defendant hath therein complained against the said plaintiff.

Third. That heretofore, to wit, on the first day of September, 1886, and for a long time prior thereto, the plaintiff and defendant were copartners, engaged in the prosecution of certain claims against the Government of the United States, known as inspector cases, and on said date, as copartners, were employed as attorneys to represent the claimants in a large number of said claims; that thereafter, to wit, on the said 6th day of September, 1886, the defendant, in consideration of $15,000 to him in hand paid by the plaintiff, by his
24 certain instrument in writing of said date, bargained, sold, assigned, and transferred to the plaintiff all his right, title,

and interest in and to the claims aforesaid and the fees to be derived therefrom, which said instrument transferring and assigning to the plaintiff the interest of the defendant in the claims aforesaid remains in full force and effect; that the amount in the said plea of set-off claimed is part of the fees received by the plaintiff from and on account of the prosecution of the claims in which the defendant formerly had an interest as copartner, as aforesaid, which interest, on the said 6th day of September, 1886, he transferred and assigned to the plaintiff, as aforesaid, by the instrument in writing aforesaid; by reason whereof the plaintiff denies the right of the defendant to set-off or recover against him any part of the sum claimed in said plea of set-off.

Fourth. That heretofore, to wit, on the first day of September, 1886, and for a long time prior thereto, the plaintiff and defendant were copartners, engaged in the prosecution of certain claims against the Government of the United States, known as inspector cases, and on said dates, as copartners, were employed as attorneys to represent the claimants in a large number of said claims; that thereafter, to wit, on the said 6th day of September, 1886, the defendant, in consideration of $15,000 to him in hand paid by the plaintiff, by his certain instrument in writing of said date, bargained, sold, assigned, and transferred to the plaintiff all his right, title, and interest in and to the claims aforesaid and the fees to be derived therefrom, which said instrument transferring and assigning to the plaintiff the interest of the defendant in the claims aforesaid remains
25 in full force and effect; that thereafter, to wit, on the first day of February, 1890, after the institution of suit herein by the plaintiff to recover from the defendant the amount in the declaration herein set forth, said defendant exhibited his original bill in equity in the supreme court of the District of Columbia against this plaintiff, wherein he sought to perpetually enjoin the plaintiff from the prosecution of suit herein, and wherein also he sought to vacate and set aside the transfer or assignment aforesaid of the interest of said defendant to the plaintiff in the inspector cases aforesaid, and for an accounting by the plaintiff of the amounts received by him as fees for the prosecution of said inspector cases, and for a decree in favor of said defendant and against this plaintiff for such amount as should be found to be due said defendant upon such an accounting; and in and by said equity proceedings the said defendant impleaded the plaintiff and sought to recover from the plaintiff a decree for the payment of moneys on account of the identical promises, undertakings in said plea of set-off set forth, and such proceedings were thereupon had in said court in said equity cause that thereafter, to wit, on the 17th day of February, 1896, the said defendant, by the consideration and decree of said court, recovered in said equity cause against the plaintiff the sum of $32,772.14, with interest thereon from the 1st day of July, 1895, until paid, for not paying and accounting to the defendant for the identical several amounts and for not performing the same identical promises and undertakings in said plea set forth, and such proceedings were had in said cause that
26 thereafter, to wit, on the 21st day of February, 1898, the decree of the said supreme court of the District of Columbia in favor

of said defendant against the plaintiff for the same identical promises and undertakings in said plea set forth was by the judgment and decree of the Supreme Court of the United States, to which court the plaintiff had prosecuted an appeal from the decree aforesaid recovered in said equity cause, reversed and remanded to the Court of Appeals of the District of Columbia, with directions to set asidet he decree of the supreme court of the District of Columbia and to remand the cause to that court with instructions to dismiss the bill; that thereafter, pursuant to the mandate of said Supreme Court of the United States, the said Court of Appeals of the District of Columbia by its order and decree vacated and set aside the decree of the supreme court of the District of Columbia, and by its mandate directed said supreme court of the District of Columbia to vacate and set aside its decree against the plaintiff theretofore passed therein, and to dismiss the defendant's bill exhibited in said cause against this plaintiff; which said supreme court of the District of Columbia, thereafter, to wit, on the 18th day of April, 1898, pursuant to said mandate of said Court of Appeals of the District of Columbia, by its judgment and decree vacated its decree theretofore passed therein and dismissed the bill of said defendant, as by the record and proceedings thereof still remaining in said supreme court of the District of Columbia and in said Court of Appeals of the District of Columbia and in said Supreme Court of the United States more fully and at large appears; which said decree dismissing the bill in equity of said defendant exhibited against this plaintiff on account of the identical matters and things and the identical promises and undertakings in said plea of said
27 defendant set forth still remains in full force and effect, not in the least reversed or made void.

CLARENCE A. BRANDENBURG,
Attorney for Plaintiff.

DISTRICT OF COLUMBIA, *ss:*

Henry M. Baker upon oath says that the pleas hereunto annexed are true in substance and fact, and that the matters and things referred to in said fourth replication touching the legal proceedings therein mentioned took place after the last pleading in this action.

HENRY M. BAKER.

Subscribed and sworn to before me this 15th day of June, A. D. 1898.

[SEAL.] F. WALTER BRANDENBURG, JR.,
Notary Public, D. C.

(Endorsed.)

Leave is hereby granted to file these replications.
June 16, 1898.

L. E. McCOMAS, *Justice.*

Joinder of Issue on Plaintiff's 1st & 2nd Replication- and Rejoinder to 3rd & 4th.

Filed Jun- 23, 1898.

In the Supreme Court of the District of Columbia.

HENRY M. BAKER
vs.
HORACE S. CUMMINGS. } Law. No. 30197.

Now comes the defendant, by his attorneys, and, with leave
28 of the court first had and obtained, files the following rejoinders to the plaintiff's several replications:

1, 2. To the first and second replications the defendant joins issue.

3. And as to the third replication of the plaintiff the defendant says that he ought not to be barred from maintaining his plea in set-off and counter-claim by reason of anything stated in said replication, because he says that he denies that the defendant, in consideration of fifteen thousand dollars or for any valuable consideration whatever, on the sixth day of September, 1886, or at any other time, executed the said instrument in writing; wherefore the same, though signed by the defendant, is wholly void and of no effect.

4. And for further rejoinder to said third replication the defendant, by leave of court first had and obtained, says that the said supposed assignment bearing date September 6th, 1886, was obtained by the plaintiff from the defendant by reason of the fraudulent concealment from and misrepresentation to the defendant by the plaintiff of the real facts concerning the true amount and value of said "inspector claims," and that the money claimed by the plaintiff to have been received by him on account of said supposed assignment, but in truth and in law received by him to the use of the defendant, came into the plaintiff's hands a long time thereafter, but before the dissolution of the said partnership and a large portion of it prior to the 10th day of February, A. D. 1889.

5. And as to the replication numbered *fourth* to the defendant's plea of set-off and counter-claim the defendant denies that
29 anything contained in the said record by the plaintiff pleaded should be received by the court in bar of said set-off and counter-claim, because he says that the matters and things in and by said record decided are not identical with the matters and things set forth in said plea of set-off and counter-claim, but concern other and different issues; wherefore the defendant prays that the said record may be inspected by the court and judgment be given of and upon the premises.

FRANKLIN H. MACKEY,
A. G. SAFFORD,
Attorneys for Def't.

Leave to file.
W. S. COX, *J.*

Surrejoinder of Plaintiff.

Filed Jul- 6, 1898.

In the Supreme Court of the District of Columbia.

HENRY M. BAKER, Plaintiff,
vs.
HORACE S. CUMMINGS, Defendant. } No. 30197. Law.

Now comes the plaintiff, by his attorney, with leave of court first had and obtained, for surrejoinder to the defendant's rejoinders to the plaintiff's replications, and says:

30 1. To the third rejoinder of the defendant the plaintiff joins issue.

2. And for further surrejoinder to the third rejoinder of the defendant, the plaintiff, with leave of court first had and obtained, says that heretofore, to wit, on the 1st day of February, 1890, after the institution of the suit herein by the plaintiff to recover from the defendant the amount claimed in the declaration set forth, said defendant exhibited his original bill in equity in the supreme court of the District of Columbia, the same being numbered 12263 on the dockets thereof, against this plaintiff, wherein and whereby he sought to vacate the instrument in writing in said rejoinder referred to, whereby the defendant assigned and transferred to the plaintiff all his interest in the claims therein mentioned, because the same was without consideration and void, and such proceedings were had in said cause that thereafter, to wit, on the 18th day of April, 1898, said supreme court of the District of Columbia, by its final order and decree, dismissed said equity suit of the defendant, as by the records and proceedings thereof still remaining in said supreme court of the District of Columbia more fully and at large appears, which said decree dismissing said bill of the defendant against this plaintiff to vacate said instrument in writing for the pretended reason that the same was without consideration and void, as in the said rejoinder set forth, still remains in full force and effect, not in the least reversed or made void.

3. To the fourth rejoinder of the defendant to the third replication of the plaintiff, the plaintiff joins issue.

31 4. And for further surrejoinder to said fourth rejoinder to the third replication of the plaintiff, the plaintiff, with leave of court first had and obtained, says that heretofore, to wit, on the 1st day of February, 1890, after the institution of suit herein by the plaintiff to recover from the defendant the amount in the declaration herein set forth, said defendant exhibited his original bill in equity in the supreme court of the District of Columbia against this plaintiff, the same being numbered 12263 on the dockets thereof, wherein and whereby he sought to vacate and set aside the instrument in writing bearing date September 6th, 1886, in said rejoinder mentioned, because the same was obtained by the plaintiff from the

defendant by the pretended fraudulent concealment and misrepresentations in said rejoinder set forth, and such proceedings were had in said cause that thereafter, to wit, on the 18th day of April, 1898, said supreme court of the District of Columbia by its final decree and order dismissed said equity cause of the defendant, as by the records and proceedings thereof still remaining in said supreme court of the District of Columbia more fully and at large appear; which said decree dismissing said bill in equity against this plaintiff to vacate and set aside said instrument in writing bearing date September 6th, 1886, because the same was obtained by the plaintiff from the defendant by means of alleged fraudulent concealment from and misrepresentations to the defendant by the plaintiff, as in said rejoinder of said defendant set forth, still remains in full force and effect, not in the least reversed or made void.

5. As to the rejoinder to the fourth replication to the defendant's plea of set-off and counter-claim, praying that the record in said rejoinder referred to may be inspected by the court and judg-
32 ment be given of and upon the premises, the plaintiff doth the like.

CLARENCE A. BRANDENBURG,
Attorney for Plaintiff.

(Endorsed:) Leave is hereby granted to file within surrejoinders. July 6, '98. E. F. Bingham, chief justice.

Defendant's Rebutters.

Filed Jul- 8, 1898.

In the Supreme Court of the District of Columbia.

HENRY M. BAKER, Plaintiff,
vs.
HORACE S. CUMMINGS, Defendant. } At Law. No. 30197.

1. The defendant, for rebutter to the second surrejoinder of the plaintiff to the third rejoinder of the defendant, says that the decree dismissing said bill of the defendant was not rendered because it was not true that said assignment was without consideration and void, but that the Supreme Court of the United States, to whom said cause had been carried by appeal and who by its mandate directed the dismissal of the said bill, expressly in its opinion delivered in said cause refused to decide whether said assignment was without consideration and void; wherefore the defendant says that he ought not to be barred from maintaining his said plea of set-off by reason of anything in said decree contained, and he prays that the said record and the said opinion of the Supreme Court of the United States may be inspected by the court and judgment given in and upon the premises.

33 2. And for rebutter to the second surrejoinder to the fourth rejoinder of the defendant to the plaintiff's third replication the defendant says that the decree dismissing said bill of the de-

fendant was not rendered because the said assignment was not obtained by the plaintiff from the defendant by fraudulent concealment and misrepresentation, but that the Supreme Court of the United States, to whom said cause had been carried by appeal and who by its mandate directed the dismissal of the said bill, expressly in its opinion delivered in said cause refused to decide whether said assignment was obtained by the plaintiff from the defendant by fraudulent concealment and misrepresentation; wherefore the defendant says that he ought not to be barred from maintaining his said plea of set-off by reason of anything in said decree contained, and he prays that the said record and the said opinion of the Supreme Court of the United States may be inspected by the court and judgment given in and upon the premises.

FRANKLIN H. MACKEY,
Att'y for Def't.

Demurrer of Plaintiff.

Filed Jul- 9, 1898.

In the Supreme Court of the District of Columbia.

HENRY M. BAKER, Plaintiff,
vs.
HORACE S. CUMMINGS, Defendant. } No. 30197. Law.

The plaintiff says the defendant's rebutter to the second
34 surrejoinder of the plaintiff to the third rejoinder of the defendant and the defendant's rebutter to the second surrejoinder to the fourth rejoinder of the defendant to the plaintiff's third replication are bad in substance.

CLARENCE A. BRANDENBURG,
Attorney for Plaintiff.

NOTE.—One of the points of law intended to be argued is that the facts in said pleadings set forth are immaterial to the issue tendered by the preceding pleadings of the plaintiff and do not constitute a sufficient reply thereto as matter of law.

Franklin H. Mackay, Esq., attorney for defendant.

DEAR SIR: Please take notice that the foregoing demurrer has been calendared for hearing before the justice holding circuit court No. 1, and will be called up for hearing in due course on the first motion day of said court occurring five days after service hereof, exclusive of Sundays.

Very respectfully,

CLARENCE A. BRANDENBURG,
Attorney for Plaintiff.

35 *Memorandum.*

November 18, 1898.—Demurrer to defendant's rebutters sustained and cause ordered on calendar, with leave to defendant to plead in twenty days.

Amended Plea in Rebutter to the Second Surrejoinder.

Filed Nov. 28, 1898.

In the Supreme Court of the District of Columbia.

HENRY M. BAKER
vs.
HORACE S. CUMMINGS } No. 30197. At Law. Docket No. —.

Now comes the defendant, by his attorney, and not by this amendment waiving his right of exception to the ruling of the court in sustaining the plaintiff's demurrer to the defendant's pleas in rebutter, but expressly and separately excepting to said ruling in respect of each of said pleas, and insisting upon his right to separately maintain them, now, by leave of the court first had and obtained, files the following amended plea in rebutter to the second surrejoinder of the plaintiff to the third rejoinder of the defendant:

The defendant, for rebutter to the second surrejoinder of the plaintiff to the third rejoinder of the defendant, says that it is not true that by said bill in equity the plaintiff therein, who is the defendant in this action, sought to vacate and set aside said
36 instrument in writing of September 6th, 1886, because the same was without consideration and void, as the plaintiff herein hath by his said surrejoinder alleged; wherefor- the defendant says that he ought not to be barred from maintaining his said plea of set-off by reason of said decree dismissing said bill, and he prays that the court inspect said record and render judgment in the premises.

FRANKLIN H. MACKEY,
Att'y for Defendant.

Surrebutter of Plaintiff to Rebutter of Defendant to Second Surrejoinder of Plaintiff.

Filed Nov. 29, 1898.

In the Supreme Court of the District of Columbia.

HENRY M. BAKER
vs.
HORACE S. CUMMINGS. } No. 30197. Law.

Now comes the plaintiff and says as to the rebutter of the defendant to the second surrejoinder of the plaintiff to the third rejoinder of the defendant, praying that the record in said rebutter referred to may be inspected by the court and judgment be given of and upon the premises, the plaintiff doth alike.

CLARENCE A. BRANDENBURG,
Attorney for Plaintiff.

37 *Defendant's Joinder of Issue on Plaintiff's 2nd Surrejoinder to Defendant's 4th Rejoinder to Plaintiff's 3rd Replication.*

Filed Dec. 13, 1898.

In the Supreme Court of the District of Columbia.

HENRY M. BAKER
vs.
HORACE S. CUMMINGS. } No. 30197. At Law.

The defendant joins issue on the plaintiff's second surrejoinder to the fourth rejoinder of the defendant to the plaintiff's third replication.

FRANKLIN H. MACKEY,
Att'y for Defendant.

Joinder of Issue.

Filed Dec. 13, 1898.

In the Supreme Court of the District of Columbia.

HENRY M. BAKER, Plaintiff,
vs.
HORACE S. CUMMINGS, Defendant. } No. 30197. Law.

The plaintiff joins issue on the plea of the defendant.

CLARENCE A. BRANDENBURG,
Attorney for Plaintiff.

38 *Stipulation for Trial before the Court without a Jury.*

Filed Feb. 27, 1899.

In the Supreme Court of the District of Columbia.

HENRY M. BAKER, Plaintiff,
vs.
HORACE S. CUMMINGS, Defendant. } No. 30197. Law.

It is hereby stipulated and agreed by and between the parties to this cause, by their respective attorneys, that this cause may be tried by the court without a jury, the parties hereby expressly waiving the same, upon the following agreed statement of facts, subject to the limitations herein contained:

That on the 31st day of July, A. D. 1889, and for a long time prior thereto, the plaintiff and the defendant were copartners engaged as attorneys in the prosecution of claims against the United States, the net fees derived therefrom being under the contract of partnership equally to be divided between them, the said partners; that on the 19th day of December, A. D. 1889, the plaintiff instituted this action to recover the sum of $2,712.81, with interest from the 31st

day of July, A. D. 1889; that the said sum is the identical sum referred to on pages 227 and 248 of the record on appeal to the Supreme Court of the United States in the equity cause hereinafter referred to; that after the institution of this suit the defendant herein instituted a certain equity proceeding against the plaintiff herein in the supreme court of the District of Columbia, the
39 same being known and numbered on the dockets of said court as equity cause No. 12263; the record, decrees, and opinions of the respective courts therein, both in this and the appellate courts, are hereby referred to and made part hereof; that the several items of account set forth in the pleas of set-off herein are respectively the identical items set up, referred to, and claimed in said equity cause.

If the court on inspection of said record and proceedings in said equity cause and of the record and proceeding- of this cause shall be of opinion that the defendant herein may not set up in bar of the plaintiff's action any of said items of set-off and counter-claim as pleaded in this action, but is concluded by the proceedings and decree in said equity cause, then this court may enter judgment for the plaintiff in this action for the sum of $2,712.81, with interest thereon from the 31st day of July, A. D. 1889, as claimed in his declaration herein, but if the court shall be of opinion that any of said items of set-off and counter-claim may be set up in bar of the plaintiff's action herein, then this cause shall be remanded to the docket for trial by jury. Both parties hereto reserve the right of appeal or by writ of error from the judgment of this court or of any court of review passing hereon and also any other remedy which they may by law be entitled to.

HENRY M. BAKER.
HORACE S. CUMMINGS.

CLARENCE A. BRANDENBURG,
Att'y for Plaintiff.
FRANKLIN H. MACKEY,
Att'y for Defendant.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1894.

No. 339.

HENRY M. BAKER, APPELLANT,

vs.

HORACE S. CUMMINGS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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In the Court of Appeals of the District of Columbia.

HENRY M. BAKER, Appellant,
vs.
HORACE S. CUMMINGS. } No. 339.

a Supreme Court of the District of Columbia.

HORACE S. CUMMINGS
vs.
HENRY M. BAKER.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 In the Supreme Court of the District of Columbia, the 1st Day of February, 1890.

Original Bill.

(Filed February 1, 1890.)

HORACE S. CUMMINGS, Complainant,
vs.
HENRY M. BAKER, Defendant. } No. 12263, Docket 30.

To the supreme court of the District of Columbia, holding an equity court.

The complainant states as follows:

1. He is a citizen of the United States, residing in the city of Washington, District of Columbia, and brings this suit in his own right.

2. The defendant, Henry M. Baker, is a citizen of the United States, and also resides in Washington aforesaid.

3. That the complainant and the defendant have, for more than fifteen years last past, been attorneys-at-law, and engaged in the general practice of their profession in the various courts of the District of Columbia, and of the United States, as well as before the executive and legislative branches of the Government.

2 4. That on or about the first day of January, 1876, the complainant and defendant entered into an agreement, by parol,

to form a copartnership to prosecute the practice of the law, at Washington aforesaid, under the firm name and style of Cummings and Baker; said agreement was to the effect that they were thereafter, and until either party should desire to end the partnership relation, jointly to prosecute their profession as attorneys-at-law as equal partners, each to share equally in all the profits or losses of their joint business, and said partnership continued from thence until about the first day of September, 1889, when it was dissolved by mutual consent.

5. That under said partnership relation, the complainant and the defendant continued to transact all their legal and professional business upon joint account as such partners, except as hereinafter specially set forth. And the complainant faithfully fulfilled all the obligations of his partnership agreement, until the dissolution thereof as aforesaid.

6. That among the items of business transacted under the agreement aforesaid were a class of cases, which consisted of claims against the United States, by inspectors of customs, growing out of a prior improper construction of sections 2733 and 2738 of the Revised Statutes of the United States, by the accounting officers of the Treasury Department. That the course of procedure in the prosecution of the said cases, which for convenience are hereafter called "inspectors' cases," was as follows: A contract was obtained from the claimant, by which the firm of Cummings and Baker agreed to prosecute the claimant's claim upon a contingent fee (in most cases) of twenty-five (25) per centum upon the amount which might be recovered. The claims were then formulated, made up and presented to the accounting officers of the Treasury Department, and if allowed, appropriations to pay the same were asked for by the Secretary of the Treasury from the Congress,
and when said appropriation was made the claims were
3 then paid by the Treasurer of the United States in the usual way. This partnership business grew to be of considerable magnitude, and as said inspectors' cases were all of similar character, it was deemed convenient in the prosecution of the business of the partnership, which embraced other important causes, that this particular class of cases should be placed in the management and control of one of the partners, and (the same being true of other cases, in the division of work in the law office of these parties), the management and control of these "inspectors' cases" passed completely to the care of the defendant, Baker, so that for several years prior to the 1st day of September, 1886, the complainant had only a general knowledge of the business being done in said cases, and nearly all the papers and memoranda in relation thereto, were in the manual possession of the defendant, Baker. And prior to that time a great many of said cases had been prosecuted to final payment, the money received thereon being collected for the most part by the said Baker, and a division of the net avails being had between the parties, in accordance with their agreement, as least so far as the said defendant Baker made return thereof. That on or before the said first day of September, a great many of

said cases had been presented to the accounting officers of the Treasury, and by those officials duly allowed, and appropriations by Congress had been made therefor, and said Baker was then engaged in the collection of the amounts due thereon. And the complainant states that the defendant Baker had full knowledge of all the details of said business, and particularly well knew and understood what of said inspectors' cases had passed to such congressional appropriation, and also well knew that the complainant did not know what the amount of such allowance for said cases was. In addition to the said cases, in which the fees of the copartnership had been fully earned as aforesaid, there were other of said cases in the office, as to which no appropriation had been
4 made by Congress, but which were still pending and awaiting allowance or appropriation; and also there were many other of said cases, the prosecution of which the firm had taken measures to secure by contract with the claimants, and which were in fact secured by the defendant, as hereinafter set forth. Of all of these matters the said defendant alone had full and complete knowledge and information; the said defendant, on or about the 6th day of September, 1886, approached the complainant and requested complainant to sell out or assign to him, for the sum of fifteen thousand dollars, complainant's interest in the fees earned in those cases where an appropriation had been made, and also in those cases where contracts had been obtained from the claimants, and in which no appropriation had been made, and also those claims, contracts for the prosecution of which it was expected would be secured by the said firm, and thereupon various conversations were had, on divers occasions, about that time, in regard to the proposed purchase of complainant's said interests by the defendant, at one of which conversations the defendant handed to the complainant a bundle of papers, which he said contained information upon which the complainant could ascertain the value of the said interest. But upon examination of the said papers the complainant was unable to gather therefrom any adequate information without the aid and explanation of the defendant, and thereupon the complainant, knowing that the defendant well knew all the facts and reposing that confidence in him which the association of many years of professional and business relation had created (besides being entitled, as the partner of him, the said defendant, to be put in possession of all the knowledge which the defendant had acquired in the prosecution of their joint business), requested the defendant to inform the complainant, first, as to the amount due the firm on account of fees which were
5 earned in said inspectors' cases and for which appropriations had been made by Congress; and, second, the amount of claims not then appropriated for by Congress. And the defendant then and there stated to the complainant that the amount of fees earned and payment of which was already provided for by act of Congress was but the sum of twenty thousand dollars ($20,000.00), and the amount of all other claims of said inspectors' cases not then appropriated for would be about eighty thousand dollars ($80,000.00) in which said last-mentioned cases the expected

fee to accrue to the firm would be about twenty thousand dollars ($20,000.00).

And this complainant avers that relying on the deliberate statement of his said partner, the defendant, in relation to this branch of their joint business which had been within the defendant's exclusive control, as aforesaid, for so long a time he, the complainant, returned the said papers to the defendant, and stated to him that he would be willing to accept defendant's offer and to assign and receive as and for his interest in the fees in all of said cases as follows: that is to say, of the twenty thousand dollars in fees already within the congressional appropriation, one-half thereof, to wit, the sum of ten thousand dollars ($10,000.00) and for the remaining cases (unappropriated for) the further sum of five thousand dollars ($5,000.00) or in all the sum of fifteen thousand dollars ($15,000.00), which offer complainant was induced to accept solely by means of the said representations of the said defendant. The defendant thereupon drew up in writing a paper purporting to be an assignment by the complainant to the said defendant of the complainant's interest in said cases for the said sum of fifteen thousand dollars, and the complainant thereupon signed and executed the said paper and delivered the same to the defendant, but the complainant not having kept a copy thereof cannot set forth the same in words and figures, and although he has repeatedly asked the defendant for a copy of the same the defendant hath hitherto wholly neglected and refused to comply with the reasonable request of the complainant in regard thereto. The defendant thereupon
6 gave the complainant a check for $15,000.00, which was duly paid.

7. And the complainant further shows that at the time of his inquiry of the said defendant as aforesaid, and when the assignment was made as aforesaid, instead of there being, as represented by defendant, but twenty thousand dollars ($20,000.00) of fees in the cases in which there had been appropriations made by Congress as aforesaid, as complainant afterward discovered, more than thirty-two thousand dollars ($32,000.000) of such fees — earned, and of which the greater portion had already been collected by the defendant, and in which the share of this complainant, as an equal partner with the defendant was one-half, or more than sixteen thousand dollars ($16,000.00), and the complainant therefore avers that the representation of the said defendant in regard thereto was false, untrue and misleading, and tended to the manifest injury, wrong and prejudice of the complainant in the premises. And the complainant further shows that instead of there being only eighty thousand dollars of claims in cases where no congressional appropriation had been made, there were more than two hundred and seventy-five thousand dollars of such claims, and although complainant does not aver that the said defendant knew the exact and full extent of the claims unappropriated for at the time he made the representations in regard thereto, yet he believes, and therefore avers the fact to be, that the defendant well knew that he was largely understating the amount thereof when he stated the same

to be eighty thousand dollars, and well knew that the complainant relied upon the truth of said statement as a basis of the agreement which resulted in said assignment.

8. And the complainant avers that he was by the wrongful act of the defendant in the premises and by means of the said untrue, false and misleading representations as to the amount of said fees, induced to execute said paper-writing purporting to be an
7 assignment of the complainant's interest in said inspectors' cases, and he therefore says that the defendant holds the said assignment against equity and good conscience, and that the same ought to be regarded as null and void and of no effect whatever, and the complainant of right is entitled to an equal division, not only of said thirty-two thousand dollars ($32,000.00), but also of such fees as the said defendant has received out of the claims subsequently collected, and that the complainant is entitled to an accounting as if said assignment had not been executed.

9. And the complainant further shows, that although his suspicions were aroused soon after executing the said assignment, as to whether the said defendant had dealt with him fairly in the matter of said inspector cases, it was not until about the first of August, 1889, that the complainant ascertained that the defendant had misrepresented the amount of fees earned and to be earned in said cases, when he executed the said assignment, and thereupon he immediately informed the defendant of his discovery and demanded that the defendant should account to him in respect thereto, but that the defendant has hitherto wholly refused so to do, and complainant states that upon a full and complete accounting between the complainant and defendant under the direction of this court in respect of said partnership matters, the defendant would be found largely indebted to complainant.

10. And the complainant further shows that on the 19th day of December, 1889, the said defendant commenced an action of assumpsit upon the common counts against the complainant on the law side of this court, demanding the sum of $2,712.81 and interest from the 31st day of July, 1889, and appended to his declaration a bill of particulars of his claim, which said declaration and bill of particulars the complainant makes a part hereof, and prays leave to read on the hearing of this cause as often as occasion may require. And complainant avers that all of the items in the
8 said bill of particulars originate in and grow out of the partnership dealings of the parties, and not otherwise, and that the said items do not constitute a full adjustment of the rights of this complainant and the said defendant, and that only by a full, proper, and complete accounting and discovery under the order and direction of a court of equity could a proper adjustment be had of the rights and equities of the complainant and defendant growing out of their partnership dealings. That the said suit at law is not yet at issue, but that the time for pleading thereto has nearly approached, and that the complainant cannot under the rules of pleading at law incorporate in his plea the equitable defences herein set forth, and which in a court of equity would prevail

against the defendant's demand, and especially is the equitable right of the complainant to have discovery in the premises and to have the said assignment cancelled and held for nought a matter not cognizable by a court of law, and if the defendant were, therefore, permitted to prosecute his said suit at law against complainant this complainant would be deprived of his defences to said suit now pending as aforesaid, and that the complainant is therefore entitled to have the defendant enjoined from prosecuting his said suit at law and to have this court order and direct a full and complete accounting between complainant and defendant in respect of their partnership dealings as aforesaid.

Wherefore complainant prays as follows:

1. That subpœna may issue according to the usages of this court, requiring the defendant to answer without oath the exigency of this bill of complaint, the complainant hereby expressly waiving an answer under oath, and particularly that the defendant shall therein full, true, and perfect answer make to the following interrogatories:

First. State the exact amount of said claims for inspectors of customs, giving the names of the claimants and the amounts
9 due to each, which had been prosecuted by the firm of Cummings and Baker up to the time of making the assignment mentioned in the bill of complaint and in which the fees had been received by said firm or either member thereof, and for which appropriation had been made by Congress prior to the making of said assignment. Also state the amount of fees received in each of said cases.

Second. State the exact amount of claims which the defendant has since said assignment prosecuted to appropriation or payment and give details showing the amount thereof, the dates of payment, and the amount received in each case and when received.

2. That the said assignment be declared null and void and be held for nought, and that the defendant be directed to surrender the same for cancellation.

3. That the defendant may be enjoined from the further prosecution of said suit at law begun in the supreme court of the District of Columbia on the 19th day of December, 1889, and numbered on the docket of said court as law No. 30197, pending this cause, and that upon final hearing the injunction may be made perpetual.

4. That a full and complete account may be had under the order and direction of this court between the complainant and defendant in respect of the said partnership dealings, and the defendant be decreed to pay to complainant the amount which may be found to be due him, and for a full and complete discovery as to all matters herein set forth.

5. That the complainant may have such other and further relief as to the court may seem just. HORACE S. CUMMINGS.

The defendant to this bill of complaint is Henry M. Baker.

FRANKLIN H. MACKEY,
A. G. SAFFORD,
Solicitors for Complainant.

10 I, Horace S. Cummings, do solemnly swear that I have read the foregoing bill of complaint by me subscribed, and that I know the contents thereof, and that the facts therein stated upon my personal knowledge are true; and those stated upon information and belief I believe to be true.

HORACE S. CUMMINGS.

Subscribed and sworn to, before me, this 31st day of January, A. D. 1890.

[SEAL.] ROBT V. HUGHES,
Notary Public.

Answer of Defendant Baker.

Filed Feb. 10, 1890.

In the Supreme Court of the District of Columbia.

HORACE S. CUMMINGS
vs.
HENRY M. BAKER. } Equity. No. 12263, Doc. 30.

The answer of the defendant, Henry M. Baker, to the bill of complaint of Horace S. Cummings in chancery exhibited.

This defendant saving and reserving all exceptions to the manifold errors in said bill contained, and answering so much thereof as he is advised it is material and necessary for him to answer, answering *and* says:

1. Answering paragraph one of said bill, this defendant says that he will not avail himself of the permission accorded by the bill to answer without oath, but will answer said bill as if *though* required to do so under oath.

This defendant admits the averments of paragraph one of said bill.

2. Answering paragraph two of said bill this defendant says that he is a citizen of the United States, sojourning in the city of
11 Washington, District of Columbia, for business purposes, but that his domicile is in the State of New Hampshire.

3. Answering the third paragraph of said bill, this defendant says that the averments thereof are true as to the defendant, but this defendant states, upon information and belief, that the complainant is not a member of the bar of the supreme court of the District of Columbia, or of the Supreme Court of the United States, or of any other legal tribunal in said District, except the United States Court of Claims, and that from September 1, 1884, to August 31, 1889, he, the complainant, never made a motion or argued a case in that court, while in session.

4. This defendant, answering the fourth paragraph of said bill, says: This defendant denies most positively the allegations in said paragraph as set forth, but avers the truth to be that the complainant and defendant did enter into a parol agreement for a limited partnership on or about the 1st day of July, 1874.

That prior to that date the complainant mentioned to this defendant that he, complainant, had heard that the defendant intended to open a law office in said city of Washington, and as the result of the conversation then had and on other occasions soon thereafter, both complainant and defendant agreed to open a law office together; that the complainant then had his office at the northwest corner of F and 12th streets N. W., in the said city of Washington, over a liquor saloon; that the defendant refused to occupy that office, and as a result the offices were opened at 1411 F street, N. W., in said city, which office the defendant now occupies, were rented, and complainant and defendant occupied them about the 15th of September, 1874, putting up firm signs, having firm letter-heads, firm cards, firm blanks, &c., all under the firm name and style of "Cummings & Baker"; that their agreement was in parol; that the defendant suggested a written agreement to be duly executed, but complainant said it was wholly unnecessary, and in consequence thereof none were executed; that by their said parol agreement each was to devote his whole time, attention, abilities, &c., to the practice of
12 the law in Government cases only, and that all of the fees so earned were to be divided equally between them with the single exception, to wit: that the complainant was to have the entire fees arising from the cases the complainant then had on file or there adjudicated, but not settled. The defendant attaches to this answer an original lithographed letter issued at its date and mailed, to the number of about two hundred and fifty, to persons believed to have legal claims against the United States. The said letter shows the letter-head first used and issued by the said firm in September, 1874. The said letter is marked Exhibit A and made a part of this answer and prays to be read at the hearing; that said copartnership, with the modifications and exceptions hereinafter stated, continued until on or about the first day of September, 1889. This defendant denies that there was any change in their partnership agreements on or about the first day of January, 1876, as complainant avers, or that there was any change whatever then or at or about that time.

5. Answering the fifth paragraph of said bill, this defendant says that under the said partnership as stated herein the complainant and the defendant continued to transact their professional business on joint account, with the exception of the complainant's unfinished business, as hereinafter stated, until on or about the — day of September, 1886, when the defendant became sole owner of one branch of the business theretofore conducted in the joint account, as will be more fully stated in answer to the subsequent paragraphs of this bill of complaint. This defendant unequivocally denies that part of said paragraph five wherein the complainant so complaisantly avers that he "faithfully fulfilled all the obligations of his partnership agreement," and asserts that in the years 1880, 1881, 1882, 1883, 1884, 1885 and 1886 the complainant became more and more neglectful of the interests of the partnership business, and seemed manifestly to lose his interest therein. So far as rendering any personal service

was concerned, this defendant was compelled to speak to complainant of his lack of service on several occasions, and went so far, in
13 consequence thereof, as to suggest to complainant a dissolution of their partnership relations; complainant objected, and assured the defendant that he, complainant, would in the future attend more closely to the business; that the improvement promised was not realized, except spasmodically; the defendant pointed out to complainant on more than one occasion business which complainant ought to secure, and which complainant promised he would attempt to obtain, but made no well-sustained effort to obtain; that had complainant done so he could have easily secured cases for and in the Court of Commissioners of Alabama Claims, organized under the act of Congress approved June 5, 1882 (22 Statutes, 98), which would have yielded fully $25,000 in fees; that complainant did not even attempt to secure such business; that all the cases in that court which we had were filed, the testimony taken, and were argued by this defendant, although he was then busy with other firm business, at which he worked more hours in one week than the complainant worked upon the firm business in a month; that the defendant earnestly urged complainant to be admitted to the bar of that court, and offered to move his admission thereto, because he wished complainant to take the testimony in some of the cases pending in that court, but the complainant refused to be so admitted, and thus deliberately kept himself in a position where he could not render that service or any other in that court; that this was only one instance of complainant's neglect, when others might be stated; that during the (about) fifteen years the partnership relations existed, in some form or another, the complainant did not even make a motion in any open court, or attempt to argue a case therein; that the defendant having all the business he could attend to, the complainant in several instances, without consulting the defendant, engaged other attorneys or agents to attend to his business, and thus not only decreased the influence of the firm, but deprived the defendant of fees to which he was justly entitled. And the defendant, further answering, says that owing to the complainant's neglect and failure to discharge his duties under and by reason of said partnership agreement, he did not, so far as defendant is advised, during the last five years and more of said partnership relation secure fees for his services to a greater amount than about $5,800, which said amount the said com-
14 plainant has not divided with the defendant, and refusing so to do the defendant hereto has heretofore brought suit against him upon the law side of this court, which suit the complainant by his bill in equity seeks to restrain this defendant from prosecuting. This defendant further says that complainant in explanation of his neglect of business, once informed defendant that he had been endeavoring to work up some "outside business," but that it had failed. He did not inform defendant of its nature, and defendant does not know what it was. Defendant further says that in the fall of 1884, H. D. Cooke & Co., bankers, failed and made an assignment to the complainant; that it was then stated

that Cooke & Co. were largely indebted to complainant, and complainant stated to defendant that he, complainant, accepted the office of assignee to protect himself; thereupon defendant stated to complainant that the assigneeship was outside of their partnership agreement, and virtually ended it; and then the defendant suggested that it be formally dissolved. Complainant replied that he did not think it would take much of his time, and that he would divide his fees as such assignee the same as though the fees were secured in the practice of the law. This defendant was not satisfied, but upon the earnest entreaty of complainant the defendant consented to make a trial of the matter. From that time until the end of the partnership relations, above five years, complainant did very little law or claim business. Complainant's neglect became so unbearable that in the early part of 1886 defendant informed complainant that he wished to close the partnership relations existing between them, and proposed to complainant that they settle to date all receipts and expenses; that each take as his own all unfinished business taken since the first day of January, 1885, and divide all fees in business taken before that date, as they should be collected, each to retain and manage the business each then had in hand. To this proposition the complainant did not consent, but proposed to divide the business on the first of January, 1886, instead of 1885, if we must close; or he said in consideration of the greater services rendered by defendant, if he, the defendant, would continue with complainant he would consent to take one-third instead of one-half of the fees collected in the class of cases called in paragraph six of the bill "inspectors' cases." At this stage of the matter the defendant offered to buy all the complainant's right, title and interest in and to the fees in the said "inspectors' cases," and offered to pay complainant $14,000 in cash therefor.

Finally, after the negotiations, and preliminaries specifically stated in the answer to paragraph six of the bill, the defendant paid complainant $15,000 and relinquished to complainant all his right to share in the fees derived from the Cook & Co. assignment for the right to the sole ownership of the fees in the said "inspectors' cases," and upon these terms the defendant consented that the partnership relations, as thus modified, might for the present continue. The partnership as thus modified continued until about the 1st of September, 1889.

6. Answering the sixth paragraph of said bill, the defendant says that each and every of the allegations averred in this paragraph are without the semblance of truth, and are unqualifiedly false, unless in some way these averments are modified by the following facts: "The course of proceedure" in the so-called "inspectors' cases" is very inaccurately and insufficiently stated by the complainant and that the complainant well knows such to be the fact,

and the defendant believes that such statement was purposely and intentionally made to the prejudice of the rights and interest of the defendant;

that the so-called "inspectors' cases" involved no less than six distinct propositions of law, dividing those cases into as many distinct classes, and that there were disputed questions of law and fact in many of the individual cases in each class. That to win those cases the defendant filed briefs, or made oral arguments or both, before the Secretary of the Treasury, the solicitor of the Treasury, the first auditor, the commissioner of customs, the Attorney General, the House and Senate Appropriation Committees and the Court of Claims (20 C. C. R., 115); that in some (form)
16 these cases were before those officers and tribunals, and before some of them the defendant appeared frequently, and before the auditor and commissioner of customs for months together almost daily. This defendant further avers that his knowledge of these cases was derived solely from his study and work; that complainant could have had an equal knowledge of them in the same way, and that frequently defendant asked complainant to render services in connection with them; and that more frequently than otherwise the complainant neglected to do so. This defendant says that at all times the complainant, prior to his sale to the defendant of all his right, title and interest in said "inspectors' cases," had full and free access to and use of all the agreements, books, papers, records and all other memoranda, which pertained to, or in any manner had any connection with those cases;

and that if the complainant did not avail himself of the opportunities that surrounded him in regard to them, he is alone to blame, and any attempt to censure any one else comes with a very bad grace from the complainant, having within his knowledge the truth of the facts herein set forth by the defendant.

The defendant further says that when he offered the complainant $14,000 for all of complainant's right, title and interest in and to the so-called "inspectors' cases" as stated in answer to the fifth paragraph of said bill, complainant considered that offer favorably, and the defendant then gathered together the books of fee agreements, a prepared list showing in what cases the fees were less than twenty-five per cent. of the amount secured; a list of all the cases allowed and not paid; a list of the pending cases; a list of the suspended pending cases; a partial list of the cases in which the fees were to be divided with other attorneys, and a list of the cases known to the defendant, which were not secured by any attorney, and which might or might not be secured by the defendant
17 or others; and the Treasury Department Registers of 1874, 1875, 1877, 1879, and 1883 were delivered to complainant by the defendant with the remark that the defendant would tell him anything in regard to them or answer any question in regard to them which he, the complainant, might ask. At the same time the defendant had in his possession and had had for from two to sixth months House Executive Documents of the first session of the 49th Congress, numbered 70 and 225, showing the whole amount of the allowances in favor of the inspectors, and at the time the said complainant took

the books and papers herein stated he, the complainant, well knew that appropriation had been made by Congress to pay all of said "inspectors' cases" enumerated in said executive documents.

All of the said books, papers, and documents are herewith submitted for the inspection of this honorable court.

The defendant further says that these books, papers, and documents were all the books, papers, and documents, except the statutes of the United States, which the defendant used to ascertain the nature and amount of the "inspectors' cases," and that they were full and ample for that purpose and were full and ample to enable the complainant to obtain an accurate and sufficient knowledge of the extent and value of the said "inspectors' cases." The defendant further says that complainant took the said books and papers away from the office and retained them in his possession for more than two weeks, and the defendant believes complainant had them at his residence. Complainant then returned them to the office. The defendant further says that he then and at all times prior to the consummation of the sale herein stated made full and complete and correct answers to all the questions asked of him by the complainant of and concerning said books and papers, as well as all facts concerning the "inspectors' cases," to the best of his
18 then knowledge and information. At this time complainant had offered to take one-third instead of one-half of the fees in the "inspectors' cases," and upon that basis the bargain and sale of his rights to fees in said cases was made.

The defendant further says that complainant was not ignorant of the amount of fees resulting from those cases, as he had occasionally divided those fees with him ever since 1877; and that in the year 1885 defendant paid to the complainant $18,000 as his share of such fees collected in that year.

The defendant further says he never offered to pay complainant more than $14,000 for complainant's interest in the said cases, but that a few mornings after the return of the books and papers aforesaid by the complainant the complainant said to the defendant, "I have been thinking the matter over, and if you think it best for me and you will pay me $15,000, I will sell out to you." The defendant then and there refused to advise him, but offered to answer any questions of fact complainant wished or desired to ask, and then said, "I think it is more than I ought to pay; but to end the matter I will give it, if you wish." The complainant said he would take it, and the sale was then and there consummated by the defendant giving complainant his, defendant's, check for $15,000, payable to the order of said complainant, and verbally relinquishing to complainant all right of the defendant to share in the fees or to be derived from the assigneeship of H. D. Cooke & Co., held by the complainant, and the complainant then signed the following paper:

WASHINGTON, D. C., *Sept. 6th*, 1886.

Received of Henry M. Baker fifteen thousand ($15,000) dollars in full for all interest in and right to fees in the so-called inspector

cases. This includes all cases in which fees have not been divided and settled, except one draft to the order of John C. Long,
19 and one to the order of James Mitchell, both dated in 1875, whether paid or unpaid, filed, or outstanding.

(Signed) H. S. CUMMINGS.

the original of which will be offered in evidence at the proper time.

This defendant, further answering, says he does not know positively, but he verily believes that his share of the assigneeship fees would have been, if honestly accounted for, not less than $5,000, so that the entire compensation paid the complainant by the defendant was really not less than $20,000. This defendant further answering says:

That he has no doubt that the complainant fully and well knew the amount of the allowances for which appropriation had been made and knew it when he offered to take the $15,000 as above stated. If he did not know it, it was because the complainant did not make a simple arithmetical computation which any grammar-school scholar of medium attainments could easily make.

This defendant, further answering, says most emphatically and especially denies that complainant ever asked defendant as alleged the amount of fees earned in those cases for which appropriation had been made, and without reservation pronounces complainant's allegation that defendant stated to complainant that such fees were but the sum of $20,000 to be wholly and entirely false. This defendant further says that he informed the complainant which of the cases reported in the House executive documents as aforesaid were not theirs, and that the list of fees in each case, when other than twenty-five per cent., gave the complainant all the information needed to determine the gross fees to be received; that the defendant also informed complainant in what cases and to what extent those fees were to be divided with other attorneys; and defendant has no reason to doubt that complainant at that time made the necessary computation to determine the fees to be thus received, which complainant must have known were more than he
20 now alleges defendant said they were. This defendant further denies, most positively, that he ever stated to the complainant that the remaining cases would amount to about eighty thousand dollars. This defendant had made no computation relative thereto, and could not have so stated. This defendant further positively denies that the complainant has ever from the date and delivery of the receipt signed by the complainant, and by complainant called an assignment, asked defendant for an examination, or a copy of it, and defendant says that had complainant done so, he, defendant, should have gladly shown it to complainant, or furnished complainant with a copy of it. This defendant further says that without request, some two months ago defendant voluntarily showed the said receipt to the complainant's senior solicitor.

7. In answer to the seventh paragraph of said bill, the defendant

says that there is not an allegation in this paragraph which is true, and they are absolutely false.

That when the complainant stated that he, complainant, was entitled to more than sixteen thousand dollars of the fees in the cases appropriated for at the time of the said bargain and sale, that he, complainant, said that which complainant had every opportunity and reason to know was false, and when complainant stated "that the representation of the said defendant in regard thereto was false and misleading, and tended to the manifest injury and great wrong and prejudice of the complainant in the premises," he, the said complainant, deliberately stated that which complainant knew well was false and in every particular untrue; and defendant says said averment is wholly and absolutely false. This defendant further says that he, defendant, absolutely avers that he, defendant, never made the statements, nor the substance of such statements as averred relative to the amount or the value of the remaining cases, and emphatically denies that the complainant relied upon or could have relied thereon.

8. Answering the eighth paragraph of said bill, this defendant absolutely and unequivocally denies each and every allegation averred therein.

21 9. Answering the ninth paragraph of said bill, this defendant denies fully, positively and absolutely that he, defendant, did not deal fairly with the complainant in the matter of said "inspector cases." As hereinbefore stated, the defendant furnished the complainant with all needed data, and all the data and information which existed, in the office or out of the office within his control in regard to the cases, that was within the knowledge and possession of the defendant, more than two weeks before the bargain, purchase and sale to the complainant, by which sale the defendant became the sole owner of the attorneyship and the fees in those cases. The defendant, further answering, says that he, the defendant, had no doubt at the time of said sale, and has no reason to have any doubt now, but that the complainant, at that time, knew and fully understood the whole matter and the effect of his act as fully and completely as this defendant then knew the same, or as any one could know it prior to the final adjudication of the pending cases. This defendant, further answering, says that within three days from the said bargain and sale aforesaid he, the defendant, left the city of Washington for a few weeks, and complainant accommodated the defendant by attending to the payment of a few of defendant's clients, for whom the money awarded them was ready, but who had not forwarded to defendant their powers of attorney, to enable defendant to endorse the drafts issued to their orders, deduct the fees due, and to remit the clients the balance. To enable the complainant to do this, the defendant left with the complainant some twelve or fifteen checks on defendant's bank, drawn to the order of the complainant, with the date and amounts thereof left blank, and were signed by this defendant as maker thereof; that complainant then, in the absence of this defendant, cancelled the check for $15,000 issued and delivered to complain-

ant by the defendant for the bargain and sale of the cases aforesaid; and from the blank checks hereinbefore described, left with complainant to fill up and pay the clients aforesaid, he, the complainant, took three of the said blank checks and filled them up in his own handwriting, each for the sum of $5,000, and respectively dated September 7, 15, and 29, 1886, which said checks will be produced at the proper time. The defendant further says that he, the defendant, left with the com-
22 plainant six sheets of schedules upon which were entered the names of all the clients entitled to payment from the appropriation then payable, and which were included in the aforesaid House Executive Documents Nos. 70 and 225, and which are the cases referred to by complainant as the cases for which appropriation was made when the aforesaid bargain and sale took place; that the said schedules contained an accurate statement of the amount allowed each of said clients, the amount of fee due from each, and the amount to which each client was entitled after the deductions of the fee the client had agreed to pay, and that defendant also left with complainant sheet No. 7, which showed the remittances made by the defendant to associate attorneys. This defendant, further answering, says that the complainant while thus acting for defendant made collections and remittances, as is shown by complainant's own handwriting on said schedule, on the 9th and 29th of September, 1886, and on days intervening between those dates; that the defendant was absent from this city all of the time between those dates, and that the complainant had during all of that time the sole possession and custody of said schedules, which showed the entire fees resulting from the said cases then appropriated for and payable as aforesaid. This defendant, further answering, says that upon defendant's return to this city, complainant returned to this defendant said schedules, defendant's bank book, unused checks, &c., and did not in any manner express to defendant any dissatisfaction with complainant's said sale to the defendant, which sale the complainant had on three separate times ratified by the three separate checks issued by complainant to his own order as aforesaid at dates twenty days apart, during all of which time the complainant had in his possession the said schedules showing the fees as aforesaid, as above stated. This defendant, further answering, says that as time ran on defendant had earned other fees in other cases, in which complainant was entitled to share; that some of those fees were collected by complainant, and some by the defendant, and that the office expenses had been paid in part by each, but to a greater extent by this defendant; that there were other matters between complainant and defendant which should be settled, and that defendant from time to time earnestly tried to secure such settlement,
23 and complainant as earnestly tried to postpone it; that the only reason complainant ever gave to defendant for his, complainant's, unwillingness to have such settlement was that complainant thought that he, complainant, owed defendant money; that complainant gave that as a reason to defendant in the year 1887; that thus matters continued until about the first day of August,

1889, when the defendant informed complainant that there must be a settlement, and that defendant intended upon such settlement to dissolve their partnership relations. It was there for the first time that complainant expressed to this defendant any apparent dissatisfaction with the sale of September, 1886, and then first having shown to defendant a paper dated September 7, 1886, entitled "Thoughts in mind for the last few days," which complainant said he wrote at the time it bears date. This defendant says that when defendant had read it he, the defendant, denounced complainant for having such a paper in his possession for about three years, and during that entire time occupying the same office with the defendant, the party upon whom the said paper is intended to reflect, and never deeming the matter of such sufficient importance as to mention it or show it to the defendant. The defendant, further answering, says that this defendant asked permission of the complainant to take a copy of said paper, which permission was granted and a true copy was made, which this defendant retains, and has now in his possession, and prays mays be read as a part of this answer, if the complainant shall fail to produce the original paper, as has been called for. The defendant, further answering, says that the defendant wrote the complainant in reply to said paper, and that complainant's attorney has been duly notified to produce at the hearing said two papers, the original and the reply thereto of the defendant, and if not produced defendant prays to be allowed to read the copies thereof at the hearing of this cause.

10. Answering the tenth paragraph of said bill, this defendant most positively denies that all of the items in his particulars of demand attached to defendant's action of assumpsit brought against the complainant originated or in any manner grew out of or were a part of the partnership dealings of the parties hereto, and emphatically and unequivocally avers that several of the said
24 items therein stated were entirely of and for an individual and personal character, and that the items thereof of the partnership origin are based upon an account stated, and so far as this defendant knows the complainant does not deny said bill of particulars. Further answering said paragraph of said bill, this defendant positively avers that the items in said particulars of demand attached to the said action at law do constitute a full adjustment of all the rights of this defendant and of the complainant, and which were all duly and properly ascertained by an accounting between the complainant and the defendant, and the result of said accounting was the stated account attached to said action at law, and which said stated account was intended at the time to be a full, complete, and final adjustment of the business theretofore existing between the parties; that complainant well knew and fully understood every item that entered into and made up said particulars of demand; that the original account, of which the particulars of demand aforesaid is a copy, is now in the possession of this defendant, and said stated account shows some of the items in said stated account are in the handwriting of the complainant, in which complainant wrote down, at the time of accounting, in the first adjustment and

stated account. That account stated was intended by all the parties to be a final statement with a balance struck, as ascertained, and nothing was left for future adjustment or to account for, and certainly no doubt can, for one moment, be entertained to the contrary. And this defendant says there are no equitable rights of the complainant outstanding that need discovery, as all the rights of the respective parties were duly considered at the time the parties hereto reached a final statement of the account sued on at law; that there remains no secret or hidden facts that were not known to the complainant, when he, the complainant, took part in making up the account stated, and nothing to discover that was not discovered and open to the complainant at that time; that the complainant has a full and complete defense at law, if he has any defense at all, which this defendant avers that complainant has not; but defendant avers that this bill is filed with a view to delay the suit at law, in the hope that some compromise may be effected.

This defendant is advised that complainant wholly failed to set forth in his said bill any fact wherein and whereby fraud or mistake or accident or error on the part of the defendant can be predicated of, and hence he prays the benefit of this answer as a demurrer as if he had specially demurred thereto.

This defendant, further answering said bill, says that he cannot make an accurate statement showing the amount of fees collected or defendant's just and proper expenses in the prosecution of said cases, because, after the bargain and sale and the payment of the money for said purchase to the complainant of September 6, 1886, defendant never kept an account of such receipts, only as is shown by remittances to clients and others which is wholly negative, and no account whatever of defendant's personal or other expenses in said inspector cases have been kept. Such expenses, however, amounted to thousands of dollars, but this defendant could not render an account of them, because he has never had any account or memorandum of them, and the complainant well knows the truth of this statement. Being the owner of said cases this defendant was not to account to any one for them. This defendant very reluctantly says the filing of this bill is an attempt on the part of the complainant to unjustly and wickedly obtain the money, by legal process, which belongs to the defendant, by reason of the fair and solemn agreement signed by the complainant, under the full light of every material fact then existing, and free and clear from any misrepresentation on the part of the defendant. This defendant feels very confident in his own mind, and therefore avers that if the complainant, for one moment, entertained the belief that this defendant could show such expenses in connection with the cases aforesaid, the complainant would not have brought this case. This defendant further answering says it is an undeniable fact, that all the complainant had to do, at any time during the twenty days that complainant had the pay schedules in his possession, to ascertain the gross fees was to add up six short columns of figures; the entries on page 7 showed the remittances to the other attorneys in the cases.

And defendant very respectfully submits that, in the light of the averments charged in the bill, *that* complainant did do so.

This defendant, further answering, says this is an attempt on behalf of the complainant, after the lapse of more than three
26 years, with the full knowledge of all the facts, to attack said sale as void; the claim here made by complainant is old and stale, and such as is not favored in equity; and especially ought such demands as this be frowned down by equity after the lapse of this period of time, and during the whole period and over of three years the complainant has not said nor made any effort against the *bona fides* of said transaction; and the complainant here pleads the statute of limitations in his behalf; that said claim did not accrue, nor was any demand made to show error or otherwise by complainant to defendant within the period of three years.

This defendant says that the complainant has made no assault upon the account stated; that he has no defense to make thereto, but his object is to set aside another and independent transaction, that was especially made over three years ago, and did not enter into or cut any figure at the date of the dissolution of the partnership, and at the time of the stated account, which said stated account was a final termination of said partnership, and the complainant opened an office in another building, and going into business on his own account.

This defendant says the injunction prayed for should not be granted, and the bill dismissed, &c.

HENRY M. BAKER.

Sworn and subscribed to before me this 10th day of February, 1890.

WILLIAM K. ELLIS,
Notary Public.

27 *Replication.*

Filed Nov. 1, 1891.

In the Supreme Court of the District of Columbia.

HORACE S. CUMMINGS
vs.
HENRY M. BAKER. } Equity. No. 12263.

The plaintiff joins issue with the defendant on his answer, and will hear the case on the pleadings and testimony to be taken.

FRANKLIN H. MACKEY,
Sol'r for Pl'ff.

28 In the Supreme Court of the District of Columbia.

HORACE S. CUMMINGS
vs.
HENRY M. BAKER. } Equity. No. 12263.

Be it remembered that at an examination of witnesses begun and held, pursuant to agreement, January 16, 1893, to take testimony

in rebuttal on the part of the complainant in the above-entitled cause, at which said examination there were present Franklin H. Mackey and H. O. Claughton, Esqrs., solicitors for complainant, and J. J. Johnson, Esq., solicitor for defendant, personally appeared before me, J. Arthur Lynham, an examiner in chancery of said court, the within-named witnesses, who, being called for and on behalf of the complainant and being first duly sworn according to law to tell the truth, the whole truth, and nothing but the truth touching the matter at issue in the above-entitled cause, did depose and say what is hereinafter set out as stated by them.

29 WASHINGTON, D. C., *January* 16, 1893,
Monday, at 3 o'clock p. m.

Met, pursuant to agreement of counsel, to take testimony in rebuttal on the part of the complainant in the above-entitled cause.

Present: Franklin H. Mackey and H. O. Claughton, Esqrs., solicitors for complainant, and J. J. Johnson, Esq., solicitor for the defendant.

Whereupon HORACE S. CUMMINGS, having been heretofore duly sworn, was called to testify in rebuttal.

Direct examination.

By Mr. CLAUGHTON:

Q. Mr. Cummings, please state whether, within the performance of your duty as a member of the firm of Cummings & Baker, a particular department of business was in your charge.

Mr. JOHNSON: Objected to because, if evidence at all, it should have been given in chief and not in rebuttal, and, secondly, because I think he has already testified to it.

A. There was.

Q. Now state what were the departments of business that were in your charge.

A. When Mr. Baker came into business connection with me I had established a business on what is known as "war claims." That was the class of business to which I intended to confine myself mostly. When Mr. Baker came in with me and after he came in with me I still pursued the same course, and I may say that I had always exclusive charge of the war-claims business.

30 Afterwards business that arose in those same departments in which the war claims arose would come in, and I would still take charge of them. Afterwards other business came in that I took charge of.

Q. Please state in what departments you did prosecute the business of the firm.

A. In the Quartermaster General's office, in the War Department, and in the Navy Department.

Q. Did the business of the firm require the prosecution of matters before the Attorney General's department?

A. It did.

Q. Please state who ordinarily represented the firm in that class of business.

A. I always did in the cases that went before the Attorney General that arose out of these claims.

Q. Did they have any business before the Land Department?

A. I did.

Q. Did the firm have?

A. It did.

Q. Who generally prosecuted those cases?

A. I did exclusively, as far as I know.

Q. Did they have any cases before the State Department?

A. We did, and, as far as I know, I had the exclusive control of them.

Q. There was filed during the cross-examination of Mr. Baker a paper purporting to be the brief used by him in the Bee Bee case before the Supreme Court of the United States. Have you seen that brief?

31 A. I have.

Q. Can you state who prepared it?

A. I will state that in the whole conduct of that case from its incipiency the work before the departments, which consisted of two arguments before the Land Office, two before the Secretary of the Interior, and two before the Attorney General, was all done by me. When the case came before the Supreme Court of the United States I prepared the brief fully and alone, and that brief I attached Mr. Baker's name to. I had it printed. When Mr. Baker came to look over it he thought there should be some additions made to the brief. He then took and interpolated, if I may so say, about a page and a half or two pages at the latter end of the brief, but the rest of the brief, as far as I know, never had an alteration nor an amendment any more than from what it was when I prepared it.

Mr. JOHNSON: The question and answer are both objected to because it is manifestly nothing in rebuttal.

Q. You say he prepared a page and a half. How did he prepare it—in manuscript, in typewriting, or how?

A. That I could not say, but it was prepared, and I took it down to the printer and it was inserted.

Q. You mean to say that it was added to the already printed brief?

A. It was added, probably, a page or two from the end—inserted rather than added.

Q. So that his matter was in whole and your matter was

32 in whole?

Mr. JOHNSON: Question objected to as leading and suggestive.

A. It was.

Q. In the conduct of the business before the Court of Claims, which member of the firm prosecuted that business?

A. Mr. Baker prosecuted his case- and I attended to my cases. I will say, in regard to the Court of Claims business, that as early as

the summer of 1873 that I filed cases Nos. 7189, 7190, 7191, 7192, and 7193, which I prosecuted and prepared every paper; no one else had anything to do with it, and I got judgment on four of them in May, 1874——

Mr. JOHNSON: This answer is objected to because it was before the firm commenced business.

A. (Continuing:) And the fifth one was thrown out on account of the statute of limitations. I will further say that I have made up petitions—entered cases in the Court of Claims—at least two to every one that Mr. Baker had there, and I think I am safe in saying seven to every one that he ever put in.

Q. You heard Mr. Baker's testimony in respect to the Executive Document- No. 70 — 225. Can you tell when you first saw these books?

WITNESS: Do you mean those identical books?

Mr. CLAUGHTON: Yes, with those check-marks.

A. I don't know that I ever saw them until I saw them at Mr. Smith's office, when they were offered in evidence.

Q. Did you ever have in your possession, prior to the assignment which you made on the 6th of September, those books or copies of them with those pencil check-marks upon them?

33 A. I never did.

Q. You also heard Mr. Baker's testimony in respect to the paper H. M. B. No. 3?

A. Yes, sir.

Q. Have you any definite recollection as to the first time you ever saw that paper?

A. I never saw it until Mr. Baker handed it to me on the morning of the 7th of May (September)* or the night of the 6th, prior to his going away.

Q. Do you mean to say that you have a definite recollection of what you have answered in answer to my question?

A. I have a most positive recollection about it. I have no doubt about it.

Q. Mr. Baker in his testimony states that that paper being in your hands on or after the 7th of September, that you could have very easily found out whether or not you had sold your interest for less than its value. What have you to say in respect to not getting this information which that paper would have afforded you?

A. When Mr. Baker handed me that paper and called my attention to the fact that all had not been collected, and that quite a number of payments were still to be made, I simply put it in my desk; I paid no attention to it, because I considered the trade was made. I had nothing to do with it, but I simply took that paper, and when a power of attorney would come in with power to cash the draft I would make the proper entry, but it never came into my head that there was anything wrong about it; I considered that I had sold out to Mr. Baker for a fair consideration. I had no idea at

* In pencil in copy.

the time that I was being paid less than one-half of the fees
34 then due; in other words, I had no idea that I was being paid with my own money.

Q. Reference has been made to the suggestion of unfairness in respect to this assignment which was written in the paper "Thoughts in mind." What have you to say in respect to that?

Mr. JOHNSON: This question is objected to because it is evidence-in-chief, if it is anything at all, and the idea of the witness about it is also objected to as manifestly incompetent.

A. I am not going to give ideas, but simply facts. My whole idea as to whether I had made a poor trade or not had nothing to do with the amount of fees received in 1886, but solely and entirely on account of the future business that would come in; when Mr. Baker had told me that there was only $75,000 or $80,000 more of cases, out of which there would be a possible $20,000 of fees, I did not know whether that was correct or not and, as I said, I could not tell, but time alone would tell.

Q. Well, just in that connection, what did time tell?

A. Time told or proved that in two years—about two years—from that time that Mr. Baker had collected more than three times the amount of cases that he told me there was, and an investigation shows that he had much more than $80,000 of cases on file prior to the time of the assignment, under powers of attorney and contract, in which I had an equal interest; that those cases amounted to more than three times the amount that he told me. These cases were identical with the cases that had been paid; there was no new question of law or of fact to be settled.

Mr. JOHNSON: These questions and answers are objected to as manifestly not in rebuttal in any sense and, as I say, if testi-
35 mony at all, it is testimony-in-chief.

Q. How much money had been collected and drafts issued for at the time of this trade?

Mr. JOHNSON: Objected to because he has already gone fully and at large into that question and the documents will show it, and that it clearly is not rebuttal.

A. I would say about $145,000 had been issued in drafts and about $92,000 had been collected in cases up to that date.

Q. What was the amount of fees, then, that had been collected or that drafts had been issued for?

A. I would say about $35,000 or $36,000.

Q. What was the amount of fees, then, that had been collected or that drafts had been issued for?

A. About $36,000, collected in fees or due on drafts issued.

Q. How much of what was due to Baker & Cummings after paying other attorneys?

A. I should say about $34,000.

Q. Why do you say about $34,000?

A. Because I have no absolutely correct knowledge.

Q. In the testimony given by Mr. Baker at our last meeting he testifies that there was $31,488.70. How much of that belonged to you?

A. One-half.

Q. How much is one-half?

A. $15,744.35.

Q. When did you first know that that amount of fees first belonged to you already collected on the drafts issued for it?

A. I first knew that late in the fall of 1888.

Mr. JOHNSON: The answer and question are objected to as evidence-in-chief, and certainly he has so testified.

Q. Something has been said in the testimony of Mr. Baker in respect to your anticipated fees in the H. D. Cook matter being involved in that transaction. Please state whether they were
36 or not.

A. The prospective fee in the H. D. Cook matter never played any part in this trade for the reason that Mr. Baker time and time again told me, "Well, you will never get anything out of that case," but when the trade was made Mr. Baker said, "Of course I shall claim nothing of whatever you may obtain in the H. D. Cook case."

Q. Well, had you at the time of that trade made anything out of the H. D. Cook case?

A. Not one dollar, but, on the other hand, the estate was heavily indebted to me.

Q. Did you ever make anything out of this matter?

A. I never did.

Mr. JOHNSON: I object to it because it is immaterial whether the witness made anything out of it or not.

Q. Mr. Baker also testified that he repeatedly objected to your not attending to the business of the firm as it was your duty to do. Please state whether or not any such objection or criticisms were made.

A. I never heard him make any objections about the manner in which I conducted my part of the business. Mr. Baker urged on me on two occasions to try my hand to obtain some French spoliation cases and to obtain some Alabama claims. I did so. I visited Salem and Newburyport and Portsmouth, but I found that the cases had already been gathered by others before. I made some effort in some of the other cases, and I found that all there was left were the remnants of the Alabama cases that were left over from the first Alabama commission or the first tribunal, and, as a
37 rule, they were in the hands of the prior attorneys. But I will say that I brought in some pretty good claims of the Alabama cases; for instance, those that came from New Orleans from Judge Whittaker, who was my associate prior to Mr. Baker's coming in with me, and also some from Mr. Fogg, of New York, who was a personal friend of my own.

Q. Now, come back again to the H. D. Cook matter. I wish you

to say when the transaction was made—the transaction of the assignment of your interest in the inspector cases—that he said he would claim nothing on what might be made out of the H. D. Cook matter. What do you mean by "when the transaction was made"?

A. I think it was subsequent, but it formed no element in my estimation and formed no element in Mr. Baker's estimation, according to his own declaration at the time, that he did not believe that anything would come out of it.

Q. Your contract was in writing, was it not?

A. Yes, sir.

Q. Has it been filed in this case?

A. It has.

38 Cross-examination.

By Mr. JOHNSON:

Q. Mr. Cimmings, when were you admitted to the bar of the Court of Claims?

A. In, I think, June or July. It might possibly have been August, but I think in July, 1873.

Q. How long after you formed this copartnership with Mr. Baker?

A. Long before.

Q. The cases that you have mentioned that you filed in the Court of Claims were the cases filed before you went into this copartnership with Mr. Baker?

A. Those that I mentioned were filed before. I will say, also, that I filed about twenty other cases before Mr. Baker entered into partnership with me.

Q. Will you give the names of those cases?

A. I cannot.

Q. Why?

A. Simply because it is so many years ago.

Q. Have you got a docket of those cases?

A. I have not.

Q. Did you ever keep a docket?

A. I did not.

Q. Did you enter your appearance in the Court of Claims in every case you filed?

A. In the first five, I did. In a large number of cases I did not, because I verified the petitions, and another attorney was
39 connected with me, inasmuch as he had gained the Tice cases, and he put me on the track of those cases.

Q. Then your name does not appear as being attorney?

A. It appears as attorney-in-fact, but not as counsel.

Q. As the party who brought suit—the attorney-in-fact?

A. Yes; I signed the petition as attorney-in-fact.

Q. Did you ever divide any of the fees in those cases with Mr. Baker?

A. I did not.

Q. Now, when and what cases did you have before the Navy Department?

A. I had the case of the steamer Mozart, in which there was a $500 fee paid, and Mr. Baker got one-half. I had the case of Bossha & Stebbins, in which the fee was about $2,000, of which Mr. Baker received one-half. I had the Lewis case, in which the fee was about $2,000, and of which Mr. Baker got one-half. I had the Japan trading case, a case in which the fee was $500, and of which Mr. Baker got one-half.

Q. Is that all?

A. I have other cases, but I cannot remember them, for it has been so many years ago.

Mr. CLAUGHTON: Can you get a list and file them?

A. Not unless I went up to the department and hunted around.

By Mr. JOHNSON:

Q. You say you attended to those cases?

A. I did exclusively and entirely and alone.

Q. Did you consult Mr. Baker about them?

A. No, sir; because it was not a class of cases with which
40 he was conversant.

Q. How was it he was entitled to half the fee, then?

A. He knew of it at the time, I presume, inasmuch as I made printed briefs.

Q. In other words, you didn't tell him that you had such cases?

A. I did.

Q. What did you talk about?

A. When any new case came in I would tell him about it. There never was a case that I knew of in the office but that he knew of it.

Q. How did you divide these fees with him, by check or pay him in money?

A. Sometimes in check and sometimes in money.

Q. Will you look up your checks for the checks you have testified you made him?

A. I cannot do that, because the bank is extinct and the checks are destroyed.

Q. How often did you destroy your checks upon the bank you kept your deposits in?

A. I never kept any checks after the settlement was made unless it was a very recent one.

Q. Well, how often did you tear up your checks that you had been given for fees in these various cases—how short a time after the settlement was made?

A. I can't tell. I have no rule for destroying checks.

Q. But you do destroy all your bank checks very soon after settlement is made?

41 A. I certainly do.

Q. What cases did you have in the War Department?

A. A great many cases. The bulk on my business lay in that department.

Q. Did you keep a list of these?

A. I did not.

Q. Can you tell how much money you realized from those cases in the War Department?

A. I should say about $50,000.

Q. Did Mr. Baker get one-half?

A. He did.

Q. What years were those?

A. All the way from 1876 down.

Q. And you mean to say that every check you paid him has been destroyed?

A. I did not pay him by checks except at a few times. We would have a settlement, perhaps, once or twice a year, and he would give a schedule of what he collected and I gave a schedule of what I collected.

Q. In case you didn't settle each case when the draft was made to you at the department, what would become of it?

A. I held what money I collected and he held what money he collected. In 1877 I collected about $28,000 of fees and, I think, Mr. Baker collected somewheres about $12,000 or $14,000; it may have been a little more. When we came to settle it, there was a balance due him by me and I paid it. If my recollection is right, I gave him a check for six or seven thousand dollars.

42 Q. Have you ever given him any checks that are not now in existence?

A. I think so—in fact, I know it. I don't suppose I have a check over two years old.

Q. What have you done with your bank book- of the bank where you made deposits and drew these checks upon?

A. I don't know where they are.

Q. Are they destroyed also?

A. I don't imagine they are, but where they are I don't know; but the bank books don't show who the payee of the check was.

Q. No; but it shows the amount of the check and the date it was made. Don't you know that the bank book would show the date of the check and the amount?

A. Certainly.

Q. Now, what cases did you have before the Attorney General?

A. I made two arguments—one before Mr. Devins, Attorney General, and one before Mr. Brewster—each on the Little Rock or the Bebe case, so called. I also appeared before the Attorney General on the question of appropriation (a very important case to me) to pay certain war claims in 1877.

Q. What was the result of your argument before the Attorney General in the Bebe case?

A. The result was that the Attorney General agreed with me entirely, and he wrote a letter to the district attorney at Little Rock ordering him to commence suit in the name of the United States to set aside the then present title to the land involved in the case.

43 Q. Do you mean to be understood that Gen. Devins agreed with you?

A. No, sir; he did not. He simply took no action whatever.

Q. Didn't General Devins reject that case a few days before he went out of office?

A. He wrote a letter, but whether it was a rejection or a postponement I cannot say.

Q. Did you not take interest enough in the case to know whether Gen. Devins had rejected it or postponed it?

A. I did at the time.

Q. But you cannot now tell?

A. My impression is that it was rejected.

Q. Well, then, there was no fee out of that case?

A. No, sir.

Q. That was a case which you claimed was your own case?

A. Yes, sir.

Q. Is that the case that went to the Supreme Court of the United States?

A. It did.

Q. Why didn't you argue it there?

A. Because I told Mr. Baker that I thought neither he nor I were able to handle that case, and my wish and advice was to obtain other counsel to argue that case, and Mr. Baker refused to listen to that proposition, and he argued it himself.

Q. Why didn't you employ somebody?

A. Simply because Mr. Baker thought we had better not.

Q. Was it not your case exclusively?

A. Yes, sir; the same as the inspector cases were Mr. Baker's—that is, he had the control of them.

44 Q. Why didn't you argue that case yourself?

A. Simply because I did not think I was competent to; neither did I think Mr. Baker was competent.

Q. You had the case originally and managed it up to that time, didn't you?

A. Yes.

Q. Didn't it occur to you early in the argument of the case that you were not competent?

A. Six months before the time of argument I talked with Mr. Baker about the matter.

Q. Were you governed by Mr. Baker in all things as to how the case should be tried and who should try it and as to whether you should employ counsel?

A. I was in a great degree, for the reason that Mr. Baker was a man who claimed to have knowledge of court practice, and it was his ambition, as I thought, to excel in court practice, but I never courted it nor wanted it.

Q. Did Mr. Baker suggest to you to employ Mr. J. B. Edmunds to argue that case?

A. I can't say whether he did or not, but if he did Mr. Edmunds refused, because I asked him if he would not, and he said no; he

was out of practice and he did not wish to appear before the Supreme Court.

Q. Now, these are the only two cases you argued before the Attorney General that you mentioned?

A. Yes, sir; the only two cases. I had much other business, but only two cases.

Q. Business for the firm?

A. Yes, sir.

45 Q. What was the other business before the Attorney General, for the firm?

A. There would be letters of inquiry for different persons wanting to know about the standing of this case or that case and other information and things of that kind.

Q. That was a matter that — clerk could attend to, couldn't he?

A. Certainly he could.

Q. Now, what was the business that you had before the Alabama court of claims?

A. I had no business before the Alabama court of claims except to turn over the cases into the office through my association to Mr. Baker to prosecute.

Q. You didn't appear in that court in any capacity?

A. No, sir; in no shape or form.

Q. Did you conduct the correspondence with Whittaker, of New Orleans, with reference to the cases that he sent you?

A. I did of a certain class, but all the Alabama cases which came to our office through Mr. Whittaker Mr. Baker attended to. He attended to that case. He liked the court practice.

Q. What cases did you attend to in reference to the French spoliation claims? What did you do in that regard and where did you go?

A. I never went before the French Spoliation Commission.

Q. Did you go before the Court of Claims in any of the French spoliation cases?

A. I never did.

Q. Now, have you testified to every case in which you took personal part individually?

46 A. I presume not.

Q. Now, Mr. Cummings, I want to know all you did individually and solely without the aid and assistance of Mr. Baker.

A. I don't know that Mr. Baker ever offered or gave any assistance in any case in my charge.

Q. That is not the question. My question is what you did and not what Mr. Baker did.

A. I simply did all the business except the answering of some letters of inquiry when I would be absent from town.

Q. Then you have testified to all the business—the part that you have taken in all the business of the firm?

WITNESS: I do not understand your question.

Q. Then you have testified very fully of everything that you have done in connection with the business of the firm?

A. No, sir.

Q. Just tell us, then, what else you did do.

A. I cannot tell at this late day of all the cases that we had any more than he can tell of cases that ran through fifteen years of business he has.

Q. Mr. Cummings, you have stated that Exhibit H. M. B. No. 3, in answer to a question by Mr. Claughton, was in your possession, and that you paid no attention to it and put it aside. You did not take enough interest in it to go over it and see what it was?

A. The transaction was closed, as I supposed.

Q. Well, you had that paper and other papers and these bank checks and bank book in your possession how long?

A. Well, I think from about the morning of the 7th of
47 September, 1886, to about the first of October, 1886.

Q. And you put this paper away and did not pay any attention to it, did not treat it with any degree of importance, that it would carry any information on the subject at all, did you not?

A. I did.

Q. When did you first look at that paper?

A. I first looked at the paper near or probably the same day, or the next day, or at the day it was that the first letter came in containing a power of attorney to indorse the draft.

Q. Then you knew what the paper was, I suppose?

A. Yes, sir.

Q. Can you tell from your recollection what was the purpose of the paper?

A. I can only tell now because I have seen it. I think now it was the usual paper that Mr. Baker prepared, and I would say that whenever the House of Representatives passed the appropriation bill providing for the payment of these claims and it became certain in our idea that the appropriation would be made, Mr. Baker would sit down and make up these schedules, and those schedules were generally made by the time the bill became a law.

Q. It was just such a paper that, under all the circumstances, you could have made yourself, couldn't you, if one had to be made?

A. Why, certainly.

Q. Now tell us, if you please, why it was that with that paper and with the blank checks in your possession signed by him and
48 with the bank book in your possession and the checks in your possession for his purchases from you of your interest in these claims of fifteen thousand dollars—why it was that you sat down and wrote what is called you-thoughts and meditations with all this information in your possession and not calling his attention to what you thought was a misrepresentation of things.

A. Simply because the idea that he had misrepresented the amount of fees in the cases, say in 1886, never came into my mind, but I did have some doubts, if I may so call it that, about the number of cases that would come in hereafter. My doubt was as to the future cases. He said eighty thousand, and I thought that perhaps there ought to be more, but Mr. Baker knew all about it; I knew nothing.

Q. But you had, as I understand you, every fact in your possession at the time you penned your thoughts and meditations?

A. No, sir I did not.

Q. Well, how long after the sixth of September was it after you wrote these thoughts and meditations?

A. Within a few days.

Q. Then you did have in your possession the evidence that you have testified to, to wit, Exhibit H. M. B. No. 3 and the congressional documents, the checks by Mr. Baker, signed in blank, and the check for fifteen thousand dollars for the purchase of your interest at the time?

A. I did.

Q. Then I want to know why it was that when Mr. Baker came in you did not at once speak to him about this transaction as being unfair?

A. Simply because there was no idea in my mind of any
49 unfairness as regards the fees of 1886, and in regard to the prospective cases I took Mr. Baker's word, and time would only develop as to whether he was right or whether he was wrong.

Q. Well, why was it that you could entertain such thoughts and put them upon paper three days after you had made this sale to him, with all the evidence that went to make up this sale in your possession, and not call his attention to any misgiving when you first saw him?

A. All that I had in my possession at the time or had seen at the time was simply the schedule of cases that had been paid or were being paid and Mr. Baker's check book.

Mr. JOHNSON: That does not answer my question. The examiner will please read it.

Q. (Question re-read.)

A. Simply because I did not have all the evidence that went to make up this sale; I only had the evidence of the amount of claims that were being paid in 1886, but I had no evidence whatever of the claims *in futuro*.

Q. But you had a misgiving, or otherwise you would not have reduced it to writing.

A. That does not follow at all.

Q. Would you reduce thoughts to writing that you knew had no foundation in fact, touching the integrity of your partner?

A. I would, for the very reason that I had fears that the cases *in futuro* were more than Mr. Baker had represented.

Q. Then, having reduced those fears and suppositions to writing three days after the consummation of the sale, and with all the evidence that advised you at the time as to the condition of
50 the cases which you sold, why was it, while you saw Mr. Baker again, you didn't tell him of the misgiving that you had in that transaction, but waited for three years before you divulged the fact to him?

A. Simply because my fears had nothing to do with the case; they were then being paid or had been paid, but as to the amount of future business, and that Mr. Baker had stated at a certain

amount, for I had asked him. When he came home he would have given me the same answer, and time would only tell by the decision and payment of these cases as to whether he was right or wrong.

Q. Why did you wait three years before you opened this subject to him?

A. Because I had no facts to go on prior to that time.

Q. Haven't you testified that you obtained this information at the next appropriation by Congress?

A. No, sir; I did not.

Q. Haven't you testified that you obtained the facts that led you to believe that everything was not fair in 1888?

A. Yes, sir; late in the fall of 1888.

Q. Why didn't you then speak to him about it the moment you ascertained the facts which gave grounds to your suppositions in your thoughts and meditations?

A. Simply because I wanted to see what the whole amount was, how many were coming in. As I recollect, the first appropriation, in the spring of 1888, was somewheres about seventy-five thousand dollars, and my first impression was—well, Baker was pretty near right. He said seventy-five to eighty thousand and he struck it pretty near right. In a few months another appropriation
51 was made, and then I thought, well, this exceeds what Baker said. Then came another appropriation, along in October, 1888, for much more, and then it was that my suspicions began to be aroused.

Q. I want to know—you gathered together all these facts, which, you say, finally warranted you in what you asserted in your paper, and waited for a lapse of time, which the statute of limitations would bar, before you spoke to him about it?

A. I did not wait any great length of time after I had discovered the real standing of these cases.

Q. But you knew enough long before the period of three years to have warranted you in speaking to Mr. Baker about this transaction?

A. I did not know enough.

Q. What did you know?

A. I know that I believed——

Q. (Interposing.) I object to your belief. I want you to state the fact.

A. I did not know enough.

Q. Then you knew at the time that you reduced to writing your thoughts and meditations that you had nothing—no fact—upon which you could say anything derogatory to the integrity of Mr. Baker?

A. No; I knew nothing, except that I thought he was mistaken in regard to the amount of future business.

Q. Why didn't you, then, when he returned home, call his attention to that fact?

A. Simply because he had given me his opinion, and he
52 knew more about it than I did, and I could see no use in

carrying on a conversation. It would have been nothing but a repetition of what had been said already.

Q. But you had the facts before you and you could have cleared it yourself, couldn't you?

Mr. MACKEY: I object to counsel arguing with the witness.

A. No, sir; I could not.

Q. You have testified that all these appropriations were made in October, 1888. Why did not you speak to him then immediately upon this appropriation being made?

A. Simply because I was waiting to find out the whole truth.

Q. Then you were waiting for the statute of limitations to bar the whole transaction?

A. I was not, sir; I kept that pretty well in view.

Q. But you knew enough about 1888 to satisfy you that there was something radically wrong in the sale which you had made?

Mr. MACKEY: If these questions are directed to the purpose of showing that the three years statute of limitations is a bar in this case, I object to the questions as entirely irrelevant, as it is our contention, and we propose to show, that the statute has no application to this case whatever.

A. In the latter part of the year 1888 I came to the conclusion or to the impression, rather, that Mr. Baker was very much mistaken as to the amount of future business as dating from the trade of 1886.

Q. As that involved your interest in the purchase by Mr. Baker of September 6, 1886, and as you say it was quite an interest,
53 why didn't you call Mr. Baker's attention to it then—that he was mistaken in what he had said, and that you desired it to be corrected?

A. Simply because I knew that there was plenty of time.

Q. Then you were willing to lull Mr. Baker along in the belief that the transaction that he had made with you was a *bona fide*, honest, and square transaction?

A. I was not willing to lull him or to persuade him or to impress him with any different belief from the facts at the time; in other words, I never until after the commencement of this suit learned the full status of the case, but I had the belief in Mr. Baker's integrity that if there was anything wrong that he would right it.

Q. Well, why did not you call his attention to it if it was wrong?

A. Simply because, as I have said, that there was plenty of time and I wanted to see what these cases all amounted to. Where I supposed there was only $80,000 of cases there was nearly $240,000, as I recollect, of cases paid in 1888 alone. I did not know but that there would be more cases paid at the very next Congress, and there was some paid at that session.

Q. Then, Mr. Cummings, you were waiting to see whether or not you had made a good deal with Mr. Baker?

A. I don't know, because the very first appropriation showed that Mr. Baker had gotten the best of the deal.

Q. Then, if that showed it, you were in possession of that fact at the time you wrote your thoughts and meditations?

A. I was not.

Q. Then you were in possession of it in October, 1888?

A. In October, 1888, I knew that Mr. Baker had collected
54 far more fees than he had represented to me.

Q. Then I desire, and I wish you would be explicit about it, so that the court may see what was your motive in not calling Mr. Baker's attention to that monstrous outrage when you found it out—why you waited so long.

A. Simply because I had not found out the fullness of it.

Q. You have found it out now, have you?

A. No, sir.

Q. How much diligence did you exercise in finding out whether he had treated you unfair in this transaction?

A. Well, I began by taking the executive documents and marking against each one the name that was familiar to me; I then went to the Secretary of the Treasury, Mr. Windom, and I asked Mr. Windom for an order on the first comptroller for a list of the inspector cases that had been paid to Mr. Baker from the 1st of January, 1888, until the 1st of January, 1889; that list Mr. Windom ordered to be furnished to me.

Q. Was that before or after you filed this bill?

A. I think it was before.

Q. Haven't you testified in chief that it was after?

A. I could not say; I don't know the day when the bill was filed.

Q. Now, Mr. Cummings, I want to know, when you were so assiduously engaged in all these various cases you have mentioned, what was Mr. Baker doing?

A. Attending to his business, I suppose.

Q. What business had he?

A. You must ask him; I don't know.

Q. You don't know what business he had outside of these
55 inspector cases, do you?

A. No, sir; and the cases before the Alabama commission.

Q. Then, he attended to all the cases before the Alabama commission?

A. Yes, sir; as I have testified.

Q. Did he not attend to all the business before the Court of Claims in which the firm was interested?

A. I don't know of any case in which they were interested, because the two cases—that is, the inspector case, the test cases of the inspectors, and one where he was the counsel in the moiety case.

Q. Those were the only two, then, before the Court of Claims?

A. Yes, sir; all that I know of.

Q. Then, whatever cases were managed in behalf of the firm in the Court of Claims was done by Mr. Baker?

A. Yes, sir; in his cases.

Q. Who attended to the firm cases, then?

A. I don't know whether there was any case filed by me in the Court of Claims, but I am inclined to think that there was.

Q. But when you say he attended to his cases before the Court of Claims, do you mean to say that they were his individual cases or the cases of the firm?

A. They were the cases of the firm.

Q. Why do you say they were his individual cases, then?

A. Simply because he took charge of a certain line of cases and I took charge of a certain line of cases.

Q. Well, then, neither of you knew what business the firm was doing, did you?

A. I think they did.

56 Q. Well, then, if he had exclusive jurisdiction of his branch and you had exclusive jurisdiction of your branch and neither consulted the other as to his separate branch, how did you make out whether anything was individual business or firm business?

A. Simply because I never had a case but that I told Mr. Baker about it, and he did the same with me.

Q. You testified, I believe, that you divided all the fees that you received in the Navy Department and War Department cases with Mr. Baker?

A. Yes, sir; and anywheres else that I know of.

Q. Did you make any effort to get any of the French spoliation claims?

A. I did.

Q. Can you state when?

A. I can't tell you the year or the day or the month.

Q. Was it your effort to get them on behalf of the firm or individually?

A. On behalf of the firm.

Q. Did you ever get any and file them in the Court of Claims?

A. I think I filed one.

Q. Mr. Cummings, didn't you say to Mr. Baker that if he would not press this matter of twenty-seven or twenty-eight hundred dollars, for which suit was afterwards brought at law, that you would call this whole matter square?

A. I did not.

Q. You are positive of that?

A. I am positive of it.

Q. Well, did you not use these words: That you would call it even with Mr. Baker, or words to that effect?

57 A. I did not.

Q. Said nothing at all to him on the subject?

A. I did.

Q. Well, what did you say to him?

A. I told Mr. Baker prior to his civil suit for several months—I told Mr. Baker that I was willing to leave this to the judgment of any good, honest man who was a lawyer, and he said he would not. I told Mr. Baker that for the sake of peace and harmony that I proposed to cut off here, then and now, and I would take whatever

I could take, and he could go on and manage his business, and we would simply part; but I never at that time, within my knowledge or recollection, ever propose to Mr. Baker any compromise on the dropping of his civil suit.

Mr. MACKEY: I want to note an objection to the testimony as to any statement made by either of the parties in any alleged effort to compromise this suit or this claim.

A. (Continuing:) Well, I was going to state, when Mr. Mackey interrupted me, that I was in hopes that this case could be amicably settled and Mr. Baker refused, and I told him directly and squarely that I withdrew any offers or any propositions or any intimations of any compromise in the case whatever.

Q. Mr. Cummings, have you any reason why you delayed bringing this suit—why you did not bring it sooner?

A. Simply because I didn't have the facts on which to bring it.

Q. You have testified, in answer to a question by Mr. Claughton, that after paying your clients and the outside attorneys there would be in round numbers about thirty-one thousand dollars, and
58 over half of that was yours. Was that the net sum due you, after deducting the incidental expenses, for the purpose of getting that fund in the shape it was?

A. Our expense account was entirely separate and alone. We would fix up our janitor's bill, rent, gas, etc., but the firm did not have any account connected with the inspector cases. I mean to say the firm did not keep any account of the expenses touching these inspector cases. I will say that I do not know of any legitimate expense connected with the inspector cases outside of what was paid to other attorneys and the ordinary costs of printing, copying, postage, etc.

Q. Mr. Cummings, do you know anything at all as to the expense connected with those cases?

A. I only know what the practice had been in the prior collections, in similar cases.

Q. I am speaking about these cases.

A. I don't know that there is any other expense other than those. I simply never knew of them.

At this point an adjournment was taken until Wednesday, January 18, 1893, at 3 o'clock p. m.

59 WASHINGTON, D. C., *January* 18, 1893,
Wednesday, at 3 o'clock p. m.

Met pursuant to adjournment.

Present: Counsel for the respective parties.

Whereupon HORACE S. CUMMINGS was recalled and further cross-examined by Mr. JOHNSON.

Cross-examination:

Q. Mr. Cummings, you have stated the fees collected by you in 1877 in the cases you class as your branch of the firm business. How many cases did that include?

A. There were two principal cases, but there may have been one or more minor cases that I cannot recollect at this time.

Q. Was the Cosgrove & McCloskey case, already referred to by you in your testimony, one of these?

A. It was.

Q. State, if you please, what was the amount allowed in that case.

A. I cannot tell at present; something over forty thousand dollars. I know there was a twenty thousand and some odd dollars' fee.

Q. What was the percentage of the fee in that case?

A. Fifty per cent. There was no contract in that case whatever, but the man who engaged me paid me fifty per cent.

Q. Then how much did you realize as fees in dollars and cents?

A. I cannot tell, only I know there was some twenty thou-
60 sand and some odd dollars.

Q. Are you able to say how much of that you deducted as expenses and how much net you divided with the defendant?

A. I know the net was twenty-odd thousand dollars.

Q. Are you able to say what you deducted for expenses?

A. I cannot. I know there was some expenses in New Orleans that I had to pay out on that matter.

Q. Well, Mr. Cummings, please state as near as you can what these expenses were and to whom you paid the amounts.

A. I cannot tell now; I do not remember. I know it was a long, complicated case. I know, among other things, that I had a man in New Orleans engaged in it to go or communicate with the War Department—with Hollabird, who was at the time issuing all the vouchers, the quartermaster at New Orleans—at the time the vouchers were issued.

Q. You are unable to say, then, how much you paid as expenses and to whom you paid it?

A. I cannot say now.

Q. Have you any data in your possession with which it would enable you to do so?

A. I have not. When the case was closed the case was closed.

Q. Well, was the steamer case for Mr. Flanagan, of Philadelphia, one of these cases?

A. It was.

Q. What were you allowed in that case?

A. I think it was $35,000.

Q. What percentage of that amount did you have as a fee?

A. I do not recollect, but the fee was something over $7,000.

Q. In dollars and cents?

61 A. Yes, sir.

Q. Well, how much did you deduct for expenses in that case?

A. Not one dollar, that I know of. If I have it has slipped my mind, but I do not recollect.

Q. How much of that fee did you divide with the defendant?

A. One-half. I divided the whole fee.

By Mr. CLAUGHTON: And he got one-half?
A. Yes, sir.

By Mr. JOHNSON:

Q. Do you recollect how you paid him—by check or money or otherwise?

A. No; I cannot tell. I know when we made the settlement Mr. Baker had a pretty large batch of the inspector cases and I had these cases. I know that Mr. Baker said that the fees he had taken in was a certain amount. What it is I cannot say. I know that I had—that my fees amounted to so much that I had collected, and the difference I paid over to him. Whether it was in check or money I could not say.

Q. Is the testimony which you have given in the case that was named—does that apply to all the other cases that you have mentioned?

WITNESS: What do you mean?

Mr. JOHNSON: I mean for what expenses did you pay then in the cases which you testified to yesterday—in the cases of the War Department and the Attorney General?

A. I very rarely had to pay out any money, simply because if a man has a case clean and square and he did not have to scour over the country for evidence and pay a man to go here and go there—why, I did what there was to do.

62 Q. Was that the condition of all the cases you have testified to?

A. Pretty much, I think.

Q. Are you certain about it?

A. Yes, sir.

Q. How much did you collect, Mr. Cummings, as fees in the cases you class as yours in 1878?

A. Indeed I could not say.

Q. In 1879?

A. I could not say.

Q. In 1880?

A. I could not say.

Q. In 1881?

A. I could not say.

Q. In 1882?

A. I could not say.

Q. In 1883?

A. I cannot say.

Q. In 1884?

A. I could not say.

Q. In 1885?

A. I could not say.

Q. In 1886?

A. I could not say.

Q. In 1887?

A. I could not say.

Q. And in 1888?

A. I collected a fee in what was known as the Hoboken case, in which there was another interest besides ours, and that in-
63 terest I paid over, and whatever there was left was the net fee.

Q. You don't know how much that was?

A. I don't recollect.

Q. How much in 1889?

A. Nothing.

Q. How much have you collected as fees in cases in possession before the dissolution of the partnership in 1889, since that date?

A. None.

Q. In your evidence-in-chief you say that after the decision of the Court of Claims in the inspector cases no question could be raised or was raised by the department in regard to any of these cases. Is that so?

A. No question was ever raised that I knew of except the question of fact which went to prove the services or the character of the services of the claimant.

Q. As these cases, according to your testimony, are not yet fully paid, how do you know that the department did not and could not in 1886, 1887, 1888, and 1889, and subsequent years, raise any points of law or fact in those cases?

A. If they did, it never came to my knowledge.

Q. In other words, it is simply an opinion of yours then, is it?

A. Yes, sir; it is an opinion of mine gathered from what has been told me in the departments.

Q. You got the information, as you say, gathered in the departments, by reason of looking after them and seeking out all the information?

A. Yes, sir; from seeking the information.

64 Q. At the last session you referred to your collection of executive documents No. 70 — 225 in evidence. Did you generally get this soon after they were printed?

A. I did.

Q. Did you get No. 70 — 225 before the deficiency bill of 1886 became a law?

A. That I cannot say; but I think I had it in my possession probably before the appropriation bill passed.

Q. Now, Mr. Cummings, you have testified that you were admitted to the bar of the Court of Claims—when?

A. I said I presented cases to the Court of Claims, as I have already stated, several times in the summer of 1873. I had five cases put in my hands. I entered them in the court. I told the clerk of the court that I had not been admitted. It was then vacation and it became necessary for me to have some orders on the departments or some calls. He told me to go and see Judge Drake. He was then living on G street, in the western part of the city. I went to see Judge Drake, and I told him that I was a new practitioner; that the court was not in session, and that I wanted to present these cases, and Judge Drake said: "Well, Mr. Cummings, that is all right; I will grant you these calls." What he indorsed on

the paper I do not know. He got them, and when he came down to court the next morning I put the papers in.

Q. Haven't you since the filing of this bill applied to the Chief Justice for the purpose of having your name placed upon the roll of the court?

A. I have, sir.

Q. When was that?

65 A. I could not tell.

Q. Did you apply to him in writing?

A. I did, sir.

Q. And do you know how the order reads?

A. I do not, sir. I took the oath. I know I went through and recited the circumstances.

Q. Was that last request of yours made to the judge in chambers or in open court?

A. In chambers. The court was not in session.

Redirect examination.

By Mr. MACKEY:

Q. Mr. Cummings, if there is any other matter or thing about which you wish to testify and have not been interrogated about, you may state it before you close this testimony.

A. Well, if you can suggest what you want to ask me, perhaps I can do a little better.

I have read over the testimony, and, in the first place, I want to explain or remove some misapprehension. First, in regard to the two cases known as the Coal case and the Baltic case. I said that those cases were in my possession and I was working on them prior to the partnership. Mr. Baker in his evidence, as I understand it, says that he examined the papers and he finds my papers dated after the partnership.

Mr. JOHNSON: This line of adding to his testimony or making corrections to it is objected to because it is argumentative, and I think his counsel are fully able to take care in court to see to the discrepancy between this complainant and defendant.

66 EXHIBIT H. S. C. No. 3.

Pittsburgh brewery.

Duquesne Way. Joshua Rhodes.

Brewer, malster, and dealer in hops.

PITTSBURGH, *Nov. 12th*, 1873.

Horace S. Cummings, Esq., P. O. box 467, Washington, D. C.

DEAR SIR: Your favors of the 8th & 11th insts. were duly rec'd and contents carefully noted. In reply I will give you a brief history of the case. In the first place, the whole of this coal was confiscated by Gen'l Butler when he took New Orleans. After a long trial he gave us back all the coal and we commenced retailing

it, getting $2.25 per bbl. for it. We then sold the gas works at New Orleans either one or two boat-loads, for which we got the money. I forget whether we got $1.75 or $2 per bbl. for it. Then the Government got one or two boat-loads and gave us vouchers, which vouchers were subsequently paid. I have forgotton the number of barrels and the amount. I think it was a Gen'l Hurlburt who was quartermaster at New Orleans at the time, but cannot say positively, as the books are up at the works and all the papers are on file in Washington city. After this the quartermaster at New Orleans gave us regular vouchers for all the balance of the coal, but left the price blank. The reason we did not get the money on these vouchers was because the quartermaster said he did not have the
67 money, and also that we wanted too much for the coal, and so referred the matter to Washington. We took depositions and made proof of what coal was selling for, and also what the gas works paid us for part of this same lot. Gen'l Ekin has these vouchers and all the papers connected with the case on file in his office at Washington city. He gave us a receipt for them which is in possession of Judge Casey.

Yours truly, JOSHUA RHODES.

68 EXHIBIT H. S. C. No. 4.

N. J. Bigley's Railroad and River Coal Company: office, foot of Grant street, Brownville packet landing.

PITTSBURGH, *Sept. 3d*, 1873.

Mr. H. S. Cummings.

SIR: Your favor of 29th ult. just to hand & in reply would say that I sold coal to Capt. Turnley, A. Q. M., for Government in the spring of '62; also to Capt. Wise, for the Navy Department, for all of which I believe we have received payment in vouchers, which I believe have also been paid. I have just returned from Cape May, Saratoga, & Niagara, where I have been for some time. I have had no time to examine our books since I last saw you, but will do so in a few days.

Yours truly, N. J. BIGLEY.

69 Mr. MACKEY: Go on, Mr. Cummings.

A. The coal case was one of the first cases I ever had when I left the department. I began this case in August, 1873, when I was in Pittsburgh, and, as evidence of it, here is one of the letters dated at Pittsburgh, from Mr. Joshua Rhodes, dated November 12, 1873, in which he gives me a history of the case, and I have been at work on it ever since until its payment, and there is a letter dated September 3, 1873, from one of the largest coal dealers in Pittsburgh who had coal in the same situation as that claimed in this Cosgrove & McCloskey case; there is a letter from him. It is simply to show that I was at work on those cases and was long before Mr. Baker had any interest in the concern.

NOTE.—The said let-ers are offered in evidence and are filed, marked "Exhibits H. S. C. Nos. 3 and 4" respectively.

A. (Continuing:) In regard to the Baltic case, that case was filed in the department for ten years prior to my taking hold of it. Mr. Flanagan saw me early in the summer of 1874 and asked me to look into it. I went over to the department and did look into it. I found what seemed to be the trouble in the case. I found that that trouble had to be cured outside of the Treasury Department rather than in it, for opposed to the case came the Confederate title, namely, this vessel had been sold by the Confederate court in Louisiana by a decree of this Confederate court, and that was brought up against the case as being rebel property. I corresponded with the parties in Louisiana and told them that it would be necessary, in order to win that case, to have the case opened in
70 the courts at New Orleans, to have the decree set aside, and to throw the ownership of the property back into the hands of Mr. Flanagan. That was done. Those proceedings were long, and it was not until those proceedings were commenced in New Orleans that I took a very active interest in the case in the Treasury. That is simply to explain that I was at work on this case long before the partnership.

In regard, also, to the case that Mr. Baker refers to, in which he thought I was derelict in duty—the Franco-American case—I will say that that case came from Judge Whittaker, in New Orleans. That case was brought into the firm by means of my prior connection with Judge Whittaker before Mr. Baker entered the firm.

I wish, also, to say in regard to this list obtained from the Treasury—I will say this——

Mr. JOHNSON (interposing): What list is that?

A. I mean the list that Mr. Johnson asked me when I obtained it.

Mr. JOHNSON: I object to this testimony upon the subject of the list. I asked the simple question, Did he obtain these lists before or after he filed the bill? Therefore I object to his undertaking to argue that question; the simple answer is yes or no.

A. I will say this: That I went over to the Treasury and examined the books of powers of attorney to indorse drafts. I made a lead-pencil list of the same. Knowing that that would not be evidence, I went to Mr. Windom and I told him that I wanted to have a list of these cases where drafts in the inspector cases were delivered to Mr. Baker between the first of January, 1888, and the first
of January, 1889, and he referred me to the first comptroller,
71 and the first comptroller came around and said that it would take a great deal of time. Mr. Windom said, "Here, if you are not in a hurry for it I can give it to you," and I said they could take all the time they wanted, and I think that there were some two months before I got the list, so in reality I had two lists—one obtained before and one obtained after.

Mr. CLAUGHTON:

Q. After and before what?

A. After and before the filing of the suit.

Mr. JOHNSON: This answer is objected to as hearsay and argumentative, and from all the reasoning that he seeks to place upon record he has not yet answered the question that he seeks to explain.

A. (Continuing:) I wish to say, in order to emphasize——

Mr. JOHNSON: I object to his argumentativeness I respectfully request his counsel to direct his attention to what is evidence.

A. (Continuing:) I wish to say to emphasize my evidence in this: I have been asked why I didn't speak to Mr. Baker when I discovered or believed that I had been wronged or overreached.

Mr. JOHNSON: Mr. Examiner, I certainly object to the answer of the witness now in the shape of what he terms "correcting his testimony" and making an argument in respect to the questions I put to him.

A. (Continuing:) When the first appropriation was made, in 1888 (as no appropriations were made between 1886 and 1888), the appropriation was about $75,000, I said to myself, Mr. Baker is pretty near right. In a short time, or in the course of two or three months, another appropriation was made of a good size, but yet an appropriation of such a size that I
72 said to myself, Well, Baker has done better than I thought, for it was an appropriation that brought the fees up to more than what I expected, but not to such an amount as I would kick upon it. In October, 1888, a still larger appropriation was made, somewheres in the vicinity of $110,000, and that surprised me. Immediately after that, or at least during the winter of 1888 and 1889, I went into the Treasury and, as I said I did, got a list of these cases where powers of attorney had been given to Mr. Baker. I took them off. I then took the executive documents, all of which took much time, and I would go over each executive document, and I made out another list, in which would be brought down the amounts, and I added these amounts up. It was not until probably along in the early part of the summer or late in the spring of 1889 that I was convinced.

By Mr. MACKEY: Did you employ any help?

A. I did employ help.

Q. You were going to say you were convinced of something.

A. I was convinced that I had been overreached, but not convinced to that degree that I could positively charge Mr. Baker with an intentional overreaching of me, and it was not until I had examined these cases, as I had no minutes to go by. I had to get the information from that source—from these executive documents—and finally I sent Mr. Baker a note and told him I wanted the powers of attorney prior to September 6, 1886. He sent them over. I put a man to work on these, and he made me an index to these

cases, stating the name of the claimant, his residence, the date of the power of attorney, and the percentage. As I had to go through the whole matter, it was work for months before I could
73 really make sure in my mind. That is what convinced me that I had been intentionally wronged.

Recross-examination.

By Mr. JOHNSON:

Q. Then, when you made up your mind that you had been intentionally wronged, it corresponded then precisely with your thoughts and meditations, did it not?

A. No, sir.

Q. What was the difference between what you suspected in your thoughts and meditations—what was the difference, in fact, in your mind as reduced to writing and the facts that you discovered in 1888?

A. The difference was the same that would be between a peanut stand and a grocery store. My supposition was at least that the claims might run over one hundred to one hundred and twenty-five thousand dollars instead of $75,000, but I had no idea until after the appropriation in October, 1888, that there was any such amount.

Q. Then the fact is simply this: As time wore along and you carried this sale in your mind you reached the conclusion that you had made a bad bargain and you desired Mr. Baker to make some remuneration for that purchase?

A. Well, I came to the conclusion after these appropriations had been made that I had been deceived terribly in the amount of future business, and the only question that arose in my mind was, Did Mr. Baker know of this amount of future business at the time when he made the sale?

Q. Mr. Cummings, do you deny that the powers of attorney and applications filed in the two cases referred to by you were dated as stated by Mr. Baker in his evidence?

74 A. I do not think there was any power of attorney at all, as I recollect; but in the Cosgrove & McCloskey case there might have been, but there certainly was no contract, and there was a power of attorney in the Flanagan case or Baltic case.

Mr. JOHNSON: Mr. Examiner, please repeat the question to the witness.

Q. (Question read by examiner to witness.)

A. I do not, because I don't know.

Q. When was the Franco-American court established, if you recollect?

A. I could not tell. Mr. Baker attended to that business.

Q. Are you able to say what information you asked for in the department before you filed your bill, and what information you asked for after you filed your bill?

A. The most of the information that I had prior to filing of the

bill was that that I gathered myself by examining the books of powers of attorney in the first comptroller's office. I don't know of any other information that I received or asked for prior to filing the bill. Subsequently to filing the bill I asked, as I have said, for the list, which has been filed, from the first comptroller's office. Afterwards I applied to the Secretary for a list of the drafts in the settlement issued in the payment of inspector cases in 1886. Afterwards I asked for a list of claims filed by Mr. Baker on or before September 6, 1886, in the inspector cases.

Q. Well, all the information that you requested to be furnished you at the department was all there was, was it not, before you filed your bill?

A. It must have been. I don't know anything about it.

75 Q. You could have ascertained by diligent inquiry, could you not?

A. I could have ascertained, and probably would, had I any idea of the actual condition of facts.

HORACE S. CUMMINGS.

Subscribed and sworn to before me this 14th day of March, A. D. 1893.

J. ARTHUR LYNHAM,
Examiner in Chancery.

76 Thereupon HARRY O. WILSON, a witness produced on the part of the complainant, being first duly sworn according to law, was examined and testified as follows:

Direct examination.

By Mr. CLAUGHTON:

Q. Mr. Wilson, what is your occupation?

A. I am book-keeper here for Corson & Macartney.

Q. Corson & Macartney are bankers?

A. Bankers and brokers; yes, sir.

Q. Did Mr. Baker have a deposit account here in September, 1886?

Mr. JOHNSON: Mr. Examiner, say that the question is objected to or any similar question enquiring into the private accounts of the defendant in any manner.

A. (Question not answered.)

Q. Do the books of your bank show whether or not Mr. Baker had a deposit account here in September, 1886?

Mr. JOHNSON: Question objected to because the issue of whether or not Mr. Baker had a bank account with this bank is not made by the issues of this case, and further objected to because it is improper to inquire into Mr. Baker's bank account with this bank or any other bank.

A. Yes, sir.

Q. Will you turn to that account and state what Mr. Baker's balance was on the morning of September 6, 1886?

Mr. JOHNSON: Objected to for the reasons before stated.

77 WITNESS (to examiner): Can I refuse to answer any of these questions?

Mr. CLAUGHTON: Well, the court will make you answer.

Mr. JOHNSON: I don't know whether he has to answer or not. He can refuse and submit to the court and take the opinion of the court on it.

Mr. CLAUGHTON (to witness): I will say that you have no option unless they object to your answering.

(To Mr. Johnson): Do you object to the witness answering?

Mr. JOHNSON: I object to the witness answering the question for the reason that they have no right to inquire into Mr. Baker's private account under the issues as made in the pleadings in this cause.

Mr. CLAUGHTON (to witness): An objection being made by the counsel, it is entirely with you to say whether or not you will answer the question. If you decline to answer it the commissioner will have to certify it to the court and get the court's opinion upon it as to whether or not it is your duty as a sworn witness to answer it.

WITNESS: Well, gentlemen, as a matter of fact, I cannot answer this question personally; I simply have to refer to the books.

Mr. CLAUGHTON: Well, we are talking about that. What do your books say, is the question.

Mr. JOHNSON: I object to his saying what the books say, and I further object to the books being referred to in this case as showing Mr. Baker's private account.

WITNESS: Well, this account stands on our books in Mr. Baker's bankers*

78 name, and as book-keeper acts in confidential relation with his clients, until I have some further authority for so doing I cannot answer the question.

Mr. CLAUGHTON: Have you been before called upon to give this information and to answer these questions?

Mr. JOHNSON: By whom?

Mr. CLAUGHTON: By Mr. Cummings' attorney and the examiner. The examiner is here now.

Mr. JOHNSON: I object to it because up to the present time no authority is shown why the witness has been called to testify at all, and the mere request of the examiner, we all know, would not place a witness in the position to testify.

A. Yes, sir; I have.

Q. Why didn't you answer?

WITNESS: When?

[* In pencil in copy.]

Mr. CLAUGHTON: When you were called upon last Monday evening.

A. I was not called on last Monday evening to testify to that.

Q. Were you asked to be a witness last Monday evening?

A. I think I was; yes, sir.

Q. Did you become a witness?

A. No, sir.

Q. Why not?

A. Because there was no occasion for it. Nobody asked me any questions.

Mr. MACKEY: Did you have a conversation with Mr. Baker just about that time?

Mr. JOHNSON: This mode of examination is objected to, Mr. Examiner, as being entirely irrelevant and immaterial and productive of nothing except the prolongation of time.

79 A. No, sir.

Q. Do you remember whether or not Mr. Cummings' attorney and Mr. Baker's attorney and Mr. Baker were over here Monday evening?

A. Yes, sir.

Mr. JOHNSON: Objected to as immaterial and cutting no figure in the merits of this case.

Q. You say they were over here?

A. Yes, sir.

Mr. CLAUGHTON: Now, will you state as succinctly as possible why they were over here and what transpired on that occasion?

Mr. JOHNSON: Objected to for the same reason.

A. Well, I came over here to get these books, and I got the book and put it out on the desk. I was asked to state Mr. Baker's balance at that time, and Mr. Baker objected to it.

Mr. MACKEY: What language did he use?

Mr. JOHNSON: I object to that.

A. He said I had no business to give his personal account to any one except himself, or words to that effect; that was the substance of it; that he had not had any business with these gentlemen or Mr. Cummings for three years or over and did not intend to have any more.

Q. As a consequence of that, what did you do?

Mr. JOHNSON: I object for the same reason.

A. I refused to tell Mr. Baker's balance.

By Mr. JOHNSON:

Q. Did you receive a subpœna to testify on that day?

A. No, sir.

80 By Mr. CLAUGHTON:

Q. You have now?
A. Yes, sir; got it this morning.

NOTE.—The counsel for the complainant here requests the examiner to certify to the court for its decision the following question, which was asked the witness and which he refused to give answer to, viz:

By Mr. CLAUGHTON:

Q. Will you turn to that account and state what Mr. Baker's balance was on the morning of September 6th, 1886?

Which is accordingly done this 21st day of January, A. D. 1893.

J. ARTHUR LYNHAM,
Examiner in Chancery.

81 TUESDAY, *February* 14, 1893, at 3 o'clock p. m.

Met pursuant to agreement.
Present: Franklin H. Mackey, Esq., of solicitors for complainant, and J. J. Johnson, Esq., solicitor for defendant.

Whereupon HARRY O. WILSON, having been heretofore duly sworn, was recalled and further interrogated as follows:

NOTE.—The witness having refused to answer the following question, which was put to him by counsel for complainant at the former session, and the same having been referred to the court by the examiner, at the request of counsel, for its decision thereon, and the court having on this 14th day of February, 1893, decided that the answer should be taken, the question is again put by—

Mr. MACKEY:

Q. Will you turn to that account and state what Mr. Baker's balance was on the morning of September 6, 1886?
A. $14,803.74.
Q. Is that the morning of September 6?
A. That was at the close of business.
Q. What was there on the morning of September 6?
A. $12,162.21.

Cross-examination.

By Mr. JOHNSON:

Q. That amount, then, was really the deposit on the 4th?
A. It was.

82 Q. The amount you testified that was there on the morning of the 6th, $12,162.21, was at Mr. Baker's credit at the end of the 4th—at the close of business on the 4th?

A. Yes, sir.
Q. No business being conducted on the 5th?
A. No, sir.

Q. Fifth of what?
A. Fifth of September.
Q. Of what day of the week?
A. I don't know, sir.
Q. Did Mr. Cummings or either of his attorneys speak to you in regard to Mr. Baker's account with Corson and Macartney before the subpœna was issued for you?

Mr. MACKEY: The question is objected to as being immaterial and irrelevant.

A. Yes, sir; they did.
Q. Which one?
A. Mr. Cummings.
Q. What did Mr. Cummings say to you?
A. Well, I don't remember exactly what it was. I did not pay very much attention to it. I think he came in, though, and wanted to know what Mr. Baker's balance was.
Q. What did you tell him?
A. I gave him these balances.
Q. How did you come to give him these balances upon his request?
A. Well, he represented to me that he was interested in this account with Mr. Baker jointly; that the account was in his name before and Mr. Baker was jointly interested in that, and it was afterwards transferred and put in the name of Mr. Baker.

83 Mr. MACKEY: This line of cross-examination is objected to as immaterial and irrelevant.

Q. Then it was upon the representation alone made to you by Mr. Cummings that you stated to him the account?
A. Well, no, taking into consideration the business that Mr. Baker and Mr. Cummings had done here.
Q. Did Mr. Cummings have anything to do with this particular account?
A. That I don't remember.
Q. Didn't Mr. Cummings have an individual account here at that time?
A. I think he did.
Q. Didn't he have an individual account here at the time he applied to you for the information concerning Mr. Baker's account?
A. Yes, sir.
Q. Then it was upon the representations and reliance that you placed in the truth of what Mr. Cummings said to induce you to exhibit Mr. Baker's private account to him, was it?
A. Yes, sir; exactly.

Mr. MACKEY: That question is objected to as a misstatement of fact, as we conceive it. We deny that that was Mr. Baker's private account. It was an account, kept in Mr. Baker's name, of partnership funds.

Mr. JOHNSON: Mr. Mackey's argument, I must submit, is out of

place here. He can make that argument upon the evidence when he gets before the judge, but not to make such an argument to the witness.

Q. Can you recollect the first time that Mr. Cummings ap-
84 plied to you to look at Mr. Baker's account?

A. Well, no, sir, I can't, because he got the figures from Mr. Corson, and he said that Mr. Corson knew that that was a joint account.

Q. Do your books show that it was a joint account or an individual account?

A. It shows that it is in the name of Mr. Henry M. Baker.

Q. Alone?

A. Yes, sir.

Q. And not in the name of anybody else?

A. No, sir.

Q. Did either member of the firm—Mr. Corson or Mr. Macartney—ever authorize you to give Mr. Cummings the information that you were asked for touching Mr. Baker's account?

A. No, sir.

Q. Did Mr. Cummings ever present to you or to the firm, as far as you know, any written or other authority from Mr. Baker to permit Mr. Cummings to look at this account?

A. No, sir; not that I remember.

Mr. MACKEY: This is plainly irrelevant.

Q. Did the firm, as far as you know, ever receive the consent of Mr. Baker that his account should be exhibited to Mr. Cummings?

A. I don't know, sir.

Q. Did you ever receive any permission from Mr. Baker to exhibit it?

A. No, sir; not that I remember.

Q. Did you keep the account and are the entries in the book that you read from in your handwriting?

85 A. Well, I think the one on the fourth is in mine, but on the 6th it is in the handwriting of Mr. Corson.

Q. How much money was deposited to Mr. Baker's credit in that account from September 7th to October 1st, 1886, both inclusive?

WITNESS: That would not take in the 6th, of course. Do you want October 1 included?

Mr. JOHNSON: Yes, sir.

A. $17,976.57, I make it.

Q. Will that account show whether or not any check for $15,000 was presented either on the 6th of September or any other day down to and including the 29th of September, 1886?

Mr. MACKEY: Objected to as not responsive to anything called out by the examination-in-chief, and also if it is directed to showing that the check for $15,000 given by Mr. Baker to Mr. Cummings was not presented at the bank, and attention of counsel is called to the fact that Mr. Cummings had stated himself that he did not pre-

sent the $15,000 check, but divided the amount up into three checks of $5,000 each.

A. Well, the account won't show that it was presented.

Q. Does your account show that $15,000 was paid out on the 6th of September, 1886, or at any day from the 6th down to and including the 29th of September, 1886?

WITNESS: Any one particular check for $15,000?

Mr. JOHNSON: Yes, sir.

A. No, sir.

Q. Will you state the balance of Mr. Baker's account on the 9th of September, 1886, if you please?

Mr. MACKEY: Objected to as irrelevant and not responsive to anything called out in the examination-in-chief.

86 A. $2,077.82.

Q. Now, what was the balance on the 15th of September, 1886, if you please?

A. $37,098.53.

Q. Now, the same for September 29, 1886, if you please?

A. $719.84.

Q. Now, will you please state, Mr. Wilson, what was the total of Mr. Baker's deposits at the close of business on October 1st, 1886?

WITNESS: Including October 1?

Mr. JOHNSON: Yes, sir; from August 30, 1886, to October 1, 1886.

A. $114,971.03.

Q. When Mr. Cummings prevailed upon you to let him inquire into the account of Mr. Baker, did you give him a statement of any figures from the account?

A. I don't think I did.

Q. Did Mr. Cummings see you more than once in reference to Mr. Baker's account?

Mr. MACKEY: This line of cross-examination is all objected to for the reasons heretofore stated. They are not responsive to the examination-in-chief.

A. I don't think he did; I don't remember.

Q. Mr. Wilson, the testimony in this case shows that Mr. Baker gave Mr. Cummings a check for $15,000, dated the 6th day of September, 1886. Now, state from your knowledge of the state of Mr. Baker's account at that time if that check had been presented at your bank on that or the next day would that check have been paid, in your opinion?

87 Mr. MACKEY: That question is objected to as irrelevant and responsive to nothing brought out in the examination-in-chief, and also because it calls upon the witness for an expression of an opinion on his part as to what would or would not have been done under a given state of facts.

A. Well, I think I will wait for further authority before I answer that question.

Mr. JOHNSON: What lights do you want?

WITNESS: It is simply an opinion of mine, you know.

Mr. JOHNSON: That is all I am asking you for.

A. Well, yes; I think it would.

Q. What are your duties here in the bank?

A. Well, I keep the books and generally attend to the business of the firm.

Q. Paying teller?

A. Yes, sir.

Q. And receiving teller?

A. Yes, sir; not particularly in any one of those capacities, though.

Q. You are not specially designated, but you do them all?

A. Yes, sir; sign checks and drafts and things of that sort.

Q. Does that account of Mr. Baker show in the ledger, or any book which you have, that it ever was a partnership account between Mr. Cummings and Mr. Baker?

A. Well, it don't show in any book except as it shows here in the name of Henry M. Baker.

Q. Then there is no reference, then, to lead any one to suspect even that it was ever a partnership account—from the appearance of it in the book?

A. No; it would look like Mr. Baker's personal account, unless there was some verbal understanding.

Q. I want to know if there is anything in the ledger which you have before you, and with the account of Mr. Baker before you, to show that that account was transferred from a partnership account of Cummings and Baker?

A. No, sir.

Q. Then all the knowledge that you had in reference to its being transferred from a partnership account to Mr. Baker's individual account was the statement made by Mr. Cummings to you?

A. Yes, sir.

Redirect examination.

By Mr. MACKEY:

Q. Mr. Wilson, you were asked if there was any business done on September 5th by the bank. Do you mean by your answer to infer that the bank did no business on that day, or——

A. (Interposing:) No, sir; there was nothing in this account that day.

Q. That is to say, there was nothing in the way of deposits made or checks cashed on that day?

A. This account don't show it.

Q. All you know is that this account shows that no deposit was made to the credit of Mr. Baker and no checks paid?

A. Yes, sir.

Q. You have stated that in your opinion that Mr. Baker's check for $15,000 would have been paid had it been presented?

A. Yes, sir; I think it would on Mr. Baker's credit.

Q. Without reference to the state of his account?

89 A. Of course if there was a few thousand dollars' difference we would probably have notified him: but if it was a nominal difference we would have paid it.

Q. That is to say, if there had been a thousand dollars difference between Mr. Baker's account and the amount of the check, you would, on Mr. Baker's credit, have paid the check, would you not?

A. Well, I don't think we would hardly have done that without finding out from Mr. Baker something about the check.

Q. Well, if it had been presented by Mr. Cummings—you knew Mr. Cummings to be Mr. Baker's partner?

A. Mr. Cummings said he was Mr. Baker's partner.

Q. You knew that it was the firm of Cummings and Baker?

A. I did on the representation of Mr. Cummings—yes.

Q. You were in the bank at that time, were you, in 1886?

A. I was here on September 6, 1886, but prior to that time for two weeks I was away.

Q. You had been employed by this bank for some time prior to that?

A. Yes, sir.

Q. And you knew both Mr. Cummings and Mr. Baker personally, did you not?

A. Yes, sir.

Q. You knew they were or claimed to be partners, did you not?

A. Yes, sir.

Q. And the fact that Mr. Baker's partner had presented a check for $15,000 would have played some part in determining your action as to whether or not you would have paid it?

90 A. Yes, sir. I think we would have paid either of those gentlemen money if they had overdrawn to a reasonable amount.

Q. But to a stranger you would have done differently?

A. Yes, sir.

Q. You were asked as to your occupation here, and it was attempted, or a seeming attempt was made, to show that you were cashier, receiving teller, and paying teller, and occupied a number of other positions.

A. No, sir; there is no such office here as cashier or anything of that sort. There is no regular paying teller or receiving teller. I am here as an employee of the firm and act for them.

HARRY O. WILSON.

Subscribed and sworn to before me this 14th day of March, 1893.

J. ARTHUR LYNHAM,
Examiner in Chancery.

Mr. Mackey, of solicitors for complainant, here announces the testimony in rebuttal on the part of the complainant closed.

J. ARTHUR LYNHAM,
Examiner in Chancery.

91 I certify that the foregoing depositions (comprising 60 typewritten pages) were taken down by me in shorthand as an examiner in chancery from the statements when and as uttered by the deponents thereof; that the same were thereafter transcribed and reduced by me into print and thereupon read and subscribed by the respective deponents in my presence.

I further certify that my fee of $37.75 for taking, certifying, and returning said depositions has been paid to me by the complainant.

And I further certify that I am not of counsel nor in anywise interested in this case.

J. ARTHUR LYNHAM,
Examiner in Chancery.

92 In the Supreme Court of the District of Columbia.

HORACE S. CUMMINGS }
vs. } Equity. No. 12263.
HENRY M. BAKER. }

MONDAY, *February 29th*, 1892, at 2 o'clock p. m.

Met, pursuant to agreement of counsel, to take testimony on the part of the complainant in the above-entitled cause.

Present: Mr. Franklin H. Mackey, solicitor for complainant, and Mr. J. J. Johnston, solicitor for defendant.

93 Whereupon HORACE S. CUMMINGS, the complainant and a witness in his own behalf, being duly sworn according to law, was examined and testified as follows:

Direct examination.

By Mr. MACKEY:

Q. Where do you reside?

A. I reside in the city of Washington, District of Columbia.

Q. You are the plaintiff in this case, Mr. Cummings?

A. I am.

Q. You allege in your bill that you were at one time a partner with the defendant, Henry M. Baker. Will you state how that partnership came about, and bring us up to the time when you made the alleged assignment set forth in the bill.

A. I was a graduate of Dartmouth college of the year 1862. Mr. Baker was a college-mate of mine for three years; he graduated in 1863. I studied law or read law under Charles H. Bell, of Exeter, Mass., afterwards governor and United States Senator. I attended the Albany law school; was admitted to the supreme court in New York December, 1863; continued my law studies in New York city; returned to New Hampshire; was admitted to the supreme court of that State in April, 1864. I came to Washington and held a clerkship in the second comptroller's office of the Treasury from February, 1865, to July, 1873, when I resigned and went into law business. I confined myself entirely and exclusively to the practice

of Government claims before the executive departments, as I don't think that a person could well attend to both branches of
94 law. I was very successful. My office was on the corner of 12th and F Sts., occupying a suite of rooms in conjunction with another gentleman who was in the same class of business. This office had been previously occupied by a Mr. ——, and it was upon his recommendation that I took them. The first year of my practice I gathered a large number of cases that I filed, and either completed or had partially completed the preparation of the same, and they were either awaiting additional evidence or adjudication. In the summer of 1874 Mr. Baker, the defendant in this suit, knowing of my success, had an idea that he could better himself by leaving the Treasury, where he had been a clerk since 1864, and proposed a partnership to me. I, having the utmost confidence in Mr. Baker and in his ability, agreed to the same, with this exception, that all cases that I had on hand or which I had filed or which I had partially prepared and done the large part of the work for their prosecution I retained for myself, but all new business that came in after the date of our partnership, in the fall of 1874, we were to share equally in the fees and to divide the expenses. There never was any partnership or articles drawn up in writing. I would also say this, that we never kept any book of accounts of any sort; he would keep his own cases and I would keep my own cases. Soon after our partnership was formed we discovered that the Government were not paying inspectors of customs and persons doing the duties of an inspector of customs the salary or compensation which was designated in the Revised Statutes. We consulted upon the matter and Mr. Baker, having been for years connected with the customs branch of the Treasury and therefore being much more familiar with that branch than I was, took charge of those cases. After a lapse of time we sent out cir-
95 cular letters, signed by Cummings and Baker, to all the persons that we knew were entitled to this additional compensation beyond what they had received, with a power of attorney to the contract. At first we sent out these powers of attorney and contracts in the name of Cummings & Baker, but for convenience sake we agreed that in my particular line that the powers of attorney should be made to me, and in these customs cases that they should be made to Mr. Baker for the more convenient handling of the cases. The method that we pursued in gathering the cases was as follows: We had all the Registers of the Treasury Department, which showed the name, the address, and the amount of compensation received by every inspector of customs in the United States, and also showing the time when he was appointed and the length of time that he was in service. It was a matter of simple calculation, knowing the time, knowing the amount that he had received, and knowing the amount that we contended he should receive, to estimate what the amount due to each man was. We would write a form of letter and then have it signed "Cummings & Baker," and then have it photo-lithographed, and those we would send out by the hundreds, writing many times to a single inspector

before we could secure his power of attorney and the contract. Our stipulated fee and the fee in all these cases, except in a very few cases, was twenty-five per cent.—of course, contingent upon success. Up to 1886 we had about one thousand powers of attorney and contracts, and we had presented and collected more than eight hundred individual claims.

Q. In the inspector cases?

96 A. In the inspector cases. On earlier powers of attorney we would present the claims from the time in which the increase pay was due up to the day that we presented the claim. In the course of a few years, if the man still remained in office, with the power of attorney we filed we would present another claim and obtain a second allowance for the man. In the course of a few years more, if the man still remained in office and his pay unchanged, we would present a third claim; so that we could make all these powers of attorney and contracts to collect as high as three claims to a person. In the prosecution of these cases we were successful until about 1883, when the Congress refused to make an appropriation, but instead of making and appropriation outright they made a contingent appropriation to pay that lot of claims that had been adjudicated by the department, with the proviso that at least two cases should be sent to the Court of Claims, and that the Court of Claims should pass thereon: that if the Court of Claims found favorable to the claimants, then the claims were to be paid, and the balance of the claims were to be paid. If unfavorable, then none of them were to be paid. Those cases went to the Court of Claims and were argued, and the Court of Claims gave a decision unanimously in our favor. After that, no question could be raised or was raised by the department in regard to any of these cases. As I have said, it was like a row of bricks; you start one to going and the rest follow.

Q. Now, come down to 1886.

A. In 1886 Mr. Baker, who had exclusive and entire charge of all of these cases, who kept all of the records pertaining

97 to them in his own desk under lock and key, and about which I knew nothing beyond the simple or general principle on which they were based, wanted to buy me out of these claims. From the first part of '86 up to September of the same year he frequently broached the subject, but nothing was done one way or the other. In August, 1886, he became very strenuous and said that he wanted this thing settled, and Mr. Baker knew that I at that time was in need of considerable money, as I was carrying on some pretty extensive building operations for myself; he offered me then $15,000 for my interest; then I told him that, though I didn't believe in parting with my interest, yet, for the sake of peace and harmony, I would sell him out my interest in these claims for what was right and fair; I asked him his opinion as to what I ought to have for my interest and he one day, I know, gave me the powers of attorney; he gave me several books of powers of attorney, about one thousand in number, and a lot of documents; I think it embraced about sixteen or seventeen executive documents

and a lot of schedules, and he said, "Look them over and see for yourself, and if there is any case that you don't understand I will explain it to you;" in fact, I would have had to ask him about every individual case, because the contract, we will say, of John Smith—I could not see whether that meant a hundred dollars or a thousand dollars; I could not tell whether he had had one allowance or two allowances; there was nothing to show how much there was still coming to John Smith, and knowing that Mr. Baker was my partner, and knowing that he was perfectly familiar with the whole subject, and knowing that as a partner he was en-
98 titled to no knowledge*ledge* about those cases to which I was not equally entitled, and believing that what he would say would be the entire truth in the matter, I said, "Mr. Baker, I make you this proposition: I will take one-half fees in all the cases in which we have power of attorneys and contracts prior to the 1st of January, 1886, or I will take one-third of all of the fees in all the cases (leaving him two-thirds), or I will take $15,000, as you offer, according to what you think is the best for me."

Q. You say Baker offered you $15,000; you didn't mention that first; you may state when he first offered you the $15,000.

A. He made the offer of $15,000 a few days before that; I could not say exactly when.

Q. Was that the time he gave you the papers or before?

A. I think it was before.

Q. What was his statement as to about what your share was worth based upon—any statement of his as to how much the business amounted to? Did you ask him, in other words, about how much these cases amounted to at that time?

A. I will say that I asked Mr. Baker how many fees there were that were due us in cases that had been adjudicated and for which appropriation had been made, and which were then in the process of collection, and he said, About $20,000 or not more than $22,000. I was somewhat surprised at that and I so expressed my surprise to him; he said that our fees in some of those cases were not as much as usual; some only about 10, 15, or 20 per cent; but I will say here, that I had never seen the list of cases with the amount of fees that had then been adjudicated in 1886, for which an appropria-
tion had been made by Congress and rulings had been made
99 in the Treasury, until after I had made an assignment to him. I simply took his word for it.

Q. Did he make any other statement in regard to the other class of cases?

A. My proposition to him to take half fees in all the cases prior to 1886 or one-third then in all the cases or $15,000. He had said that there was 20,000 and not more than 22,000 of fees then due and in process of collection, and that there was not more than 75 or 80,000 dollars of cases in the future.

Q. You say "$75,000 or $80,000 of cases." What does that mean—the amount of fees?

A. No; it means the cases of which the fees would be 25 per cent. of the 75,000 or 80,000.

Q. Did the $22,000 consist of fees?

A. They were actual fees earned and due us then.

Q. And represented about $84,000?

A. According to our usual schedule of fees, $84,000 of collections. After I had made this offer to Mr. Baker, relying upon his statement of the amount of fees then due and of the cases still to be prosecuted, in a day or two he came and presented me with an assignment and a check for $15,000.

Q. You are going a little too fast. You were upon the point where he had given you certain papers after stating to you that these fees in the cases in which appropriation had been made amounted to $20,000 or $22,000, and that the other claims in which no appropriation had been made amounted to $75,000 or $80,000. You say that he gave you some papers to examine. What did you do with those papers?

100 A. When he gave me the papers to examine I found that it was totally impossible to find or to make an estimate of the amount due or the value of those cases without examining every one of the thousand claims, and in that case I knew nothing about any of them, and I would have been obliged to consult Mr. Baker about every individual claim; so after looking over the papers and seeing the utter uselessness of my attempting to make any such computation I gave them back to him and told him I should have to rely upon his judgment, and, relying upon his judgment, I made the offer on his representation that I have before recited. He then, as I have repeated, presented me with a contract and a check for $15,000. I said, "Baker, then you think this is for my advantage?" What reply, if any reply, he made I don't recollect. That night or next morning he left town, because at that time he was engaged in politics in New Hampshire. He handed me the schedule and requested me to go on collecting the fees. He also said, "Cummings, don't put in that check for $15,000, for there is not money enough to pay it." I was a little surprised at that, because I had supposed that the cases had nearly all been collected, and that the money was there to pay me the $15,000. He had left me his check book signed in blank and in a day or two wanted some *some* money. I cancelled the $15,000 check, and I filled up a $5,000 check and put it in and collected it. I went on collecting the cases, crediting the amount of fees to Mr. Baker's account, until I collected $5,000 more of fees. I then paid myself out of my collections a second $5,000 on the 15th of September, 1886.

Q. By putting the money in the bank?

101 A. By putting the money to Mr. Baker's credit in the bank and filling up a blank check of his for $5,000. I collected it and took the money. I then went on collecting still more, and on the 29th day of September, 1886, I paid myself $5,000 more, so that nearly all of the $15,000 that I took in payment I collected myself.

Q. From the department?

A. From the department. There were deposited in Carson & McCartney's bank, on account of the collections on this specific

lot of claims on which I made an assignment to Mr. Baker, at—$128,000.

Q. Who deposited them?

A. Mr. Baker and myself, both.

Q. How much did you deposit?

A. I could not say. I deposited over $30,000.

Q. Now, then, your check was paid in that way. When did you first obtain any knowledge as to the amount of claims which had been collected by Baker upon the first class of cases—I allude to the class of cases in which he said there were from $20,000 to $22,000 in fees, the cases in which appropriation had already been made; and you may also state at the same time when you first discovered in regard to the other class of cases in which no appropriation had been made—when you first discovered the amount?

A. The amount of the claims that had been adjudicated and which were in the process of collection I discovered, of course, within a day or two after Mr. Baker had delivered me the schedules,
and I continued the collections, because these schedules
102 contained the name, the amount, the fee, and all the data pertaining to each case, and it was hard for me to reconcile the amount of fees that he said and the amount of fees that were on the schedule, and I know often we had to pay out a large amount of our fees to other attorneys, as I frequently had paid one-half of a fee to a local attorney to work up the evidence, and I had supposed the great diminution of these fees from what I supposed, viz. $32,000, in the vicinity of $30,000 was owing to the division with other lawyers. It has been my habit in a number of cases—I write down my ideas of things, and on that occasion I sat down and I made a private memorandum for myself, giving my impressions of the matter, wondering as to whether I had done the best or not and wondering if the facts were——

Mr. JOHNSTON: This is objected to as immaterial and inadmissible and irrelevant.

A. (Continuing:) I made a private memorandum as to my impressions of the case and that I preserved for some time.

Q. Now, passing from that, you were stating that you collected these fees and paid your check out of the fees that you collected, after first depositing them to Mr. Baker's credit in the bank. What I want to get at is this: When did you first discover and how did you discover that Mr. Baker had overreached you in getting this assignment from you?

A. Mr. Baker, when I made the assignment, said that there was $75,000 or $80,00 of cases. Under Congress of 1886 and '7 Mr. Baker had had allowed about $75,000, or in that vicinity, of in-
spector cases and which went to Congress for appropriation;
103 that Congress made no appropriation for the deficiency bill and it failed. I thought then Mr. Baker was pretty near correct in his estimate, $75,000 to $80,000; that was what he told me there was of additional cases and that is the amount that was set up for appropriation, I supposing that that was all the cases there were, and

he had no further cases adjudicated that I know of in the year of 1887. In the winter of 1887 or '88 Congress made an appropriation to cover the $75,000 or $80,000 of cases that had been sent up the previous Congress and which remained unappropriated for. When they were allowed I helped Mr. Baker, aided him as much as usual—in fact, I gave as much aid, or perhaps more, in collecting this lot of cases in January or February, 1888, as I ever had in collecting any of the others. To my astonishment, late in the spring of 1888 Mr. Baker had another lot of cases sent up, amounting to about $70,000 or $75,000 worth of cases. Then I began to think, Could it be that Mr. Baker could have been so mistaken as to get out only one-half of the cases? Along in August, to my astonishment, there was another lot of about $60,000 or $70,000 worth of cases allowed, making something over $200,000 worth of cases, while I had supposed there was $80,000.

Q. More than Mr. Baker told you?

A. Yes, sir. In the collection of these cases Mr. Baker was quite worried on account of a recent order that had been issued on the Secretary of the Treasury in regard to the issue of drafts.

Q. You found out that there were $200,000 up to that time?

A. Yes, sir; and there were several lots after that. It was when I saw, in 1888, this large amount of cases allowed, where I had supposed there was only $80,000, according to Mr. Baker's
104 statement, that it set me to thinking. I then began to investigate the question of the fees of 1886—the first lot of cases.

Q. That is, that lot of cases in which he stated that the fees were from $20,000 to $22,000?

A. Yes; and I was convinced that the fees that were due and had been earned and paid in September and October, 1886, instead of being $20,000 and $22,000, were really from $32,000 to $34,000, one-half of which were mine at the time when I made the assignment.

Q. Then, in regard to the other class of cases, you say you discovered that they, instead of being $75,000, amounted to about $200,000?

A. Amounted to $275,000 of cases, my opinion is.

Q. From your knowledge of the business, you say there probably was a hundred thousand dollars more?

A. No, I don't know; there was a great many thousand; I cannot say how many thousand.

Q. There is a great many thousand dollars more that haven't been collected yet?

A. Yes, sir.

Q. Having made this discovery, did you say anything to Mr. Baker about it?

A. Not at that time.

Q. State why and when you did speak to him.

A. I said nothing to him because I had implicit confidence in Mr. Baker and I believed that he would do what was right. The matter drifted along until the summer of 1889. No settlement was

made between us in regard to any matters, and one day the
195 conversation came up, and I said, "Mr. Baker, I want to talk about those inspector cases." He said, "Well, what do you want to say?" I said, "Baker, how many fees were there that were due, one-half of which were mine, in September, 1886, the time I made that assignment to you?" He said, "Twenty or twenty-two thousand." I said, "Will you let me see the schedule?" He said, "No; I will not." I said, "Have you the schedule?" He said, "I have." I said, "Why will you not let me see them?" He said, "Because it is none of your business." I then pulled my memorandum out that I had made in 1886, giving my impression of the affair, and read it to him. He was very excited over it. We had some conversation. The next morning Mr. Baker asked me, "Are you willing that I should read that memorandum?" I said certainly: I have nothing to conceal." So I let him have it. In a day or two he handed me, or rather I saw lying on my desk what I supposed was the memorandum: I have never seen it from that day to this. I then moved my office after that, and what became of the memorandum and of a great many other papers I don't know. Under the circumstances, I lost at that time the checks covering over a hundred thousand dollars in my accounts with Carson & McCartney. I have never been able to discover them, and I presume they were lost or mislaid in the hurry of moving; anyway, it has caused me a good deal of trouble, but I have never seen that memorandum from that day to this.

Q. You have stated that you spoke to him about the cases in which appropriation had already been made in September, 1886, when you made the assignment; did you speak to him at any time in regard to the great difference between the amount of
196 other claims which he stated would be collected ($80,000) and the amount which was actually collected, $275,000?

A. I spoke to him about this great discrepancy many times, but he never would answer me. On the 23rd of August, 1889, I wrote him a letter in which I said practically: "This whole difference between us can be settled in a moment if you will only show me the list of cases and of fees that were received in 1886. You say that there was only $20,000 to $22,000 of fees; I say that there were from $32,000 to $34,000 of fees. What did you do with the other $12,000 *or* $14,000? Did you pay it out to any person? I don't care to whom or for what you did pay it. Did you pay it out, and will you give me your word that you did pay them out?" I received a letter from him dated August 24: "It is none of your business; I bought you out of those claims, horse, foot, dragoon and all."

Q. Mr. Baker always refused—that is, in relation to the $20,000 or $22,000 of fees that you collected on this appropriation. My question, however, was directed to the $275,000 of claims which he afterwards collected?

A. He never would discuss the point with me at all; I went so far as to tell him—I said, "Mr. Baker, I am willing to leave this to any person that you may select."

Q. Leave what?

A. The whole question of my claim, to any person that he might select.

Q. Your claim for what?

A. To know the difference of the fees that were received in 1886, and he always refused. I have since made him the
107 offer to leave it to arbitration of any one he chose, and his answer was, practically, "I won't discuss this question of the assignment and of the claims collected after the assignment."

Q. Now, it is alleged in the answer of Mr. Baker—Mr. Baker states in his answer that having full knowledge of all the facts necessary to "attack said sale as void, have allowed three years or more to elapse without making complaint." You may state why you made no complaint sooner than that.

A. It was impossible to tell whether I had been deceived or not in regard to the number of claims until the claims had been allowed and paid. There was no payment of claims for one year and four months after the date of the assignment, and it was not until the summer or spring of 1888 that I was aware or could be aware that any more than $75,000 or $80,000 of claims were still to be prosecuted, and it was not until the fall of 1888 that I knew that the amount of claims was so much in *the* excess of what Mr. Baker told me.

Q. In other words, you didn't find out the extent to which you had been overreached until late in the fall of 1888?

A. I couldn't find out, because the claims were never adjudicated or appropriated for before that time.

Q. Then you filed this bill on the 1st of February, 1890. Between the fall of 1888, when you found out that you had been overreached, until February, 1890, what were you doing in respect of this matter that you didn't file it sooner? Were you discussing the matter with Baker?

A. After the fall of 1888 I said nothing to Mr. Baker in regard to this apparent discrepancy until the summer of 1889, when
108 we discussed the matter and wrote many letters about it to each other, up to the time when the suit was commenced.

Q. What led to your leaving that office and taking and office of your own?

A. Under the circumstances, when a man finds that he can't put any confidence or trust in a person whom I believed had deceived me so greatly, it was impossible to remain with that man, and I chose to move from the office because Mr. Baker lived in the building. The room back of the office he kept as a sleeping-room. He had all of his personal property—his desks, his furniture, his clothing—and it was much easier for me to move than for Mr. Baker, and so I left the office.

Q. And went into business for yourself, did you?

A. I went into business for myself, and which I have since continued.

Q. After you had your suspicions aroused by the large amount of claims that were being collected by Mr. Baker, did you make any

effort at that time to find out by inquiry at the department how much Mr. Baker had collected of claims? You may state when, if you did make any such effort.

A. I can't tell when, but after I had had my talk with Mr. Baker and he refused to give me any information in regard to the amount of fees, one-half of which was mine and due from September, 1886, I went to the department and obtained an order from Mr. Windom upon the commissioner of customs to furnish me with a list of the drafts payable under the appropriation of 1886 in the customs and inspector cases that were delivered to Cumming & Baker.
109 That list the commissioner of customs made out and sent to me under his signature. I also had an order from Mr. Windom for a list of all of the drafts that were delivered on account of inspector cases since the 1st of January, 1888. That list was also made out and furnished——

Q. How long was it before you brought suit that you got that list?

A. It was afterwards. I had made the calculation from the executive documents and from cases that I knew we had the power of attorneys in, approximately, before, but nothing final or conclusive. At the same time when I got the list from the department of the drafts that were delivered to Mr. Baker or Cummings & Baker on account of the inspector cases I obtained the powers of attorney I set a man to work on the powers of attorneys, and he went through them, and it took him about a month to do it.

Q. That was after you brought your suit. I was speaking of the time before you brought your suit. You have already stated that you were discussing this matter with Mr. Baker for some time before you brought suit.

A. Yes; for six months.

Q. Discussing what?

A. Endeavoring to get a statement from him of the amount of fees that wer- due us and earned in 1886, one-half of which was mine.

Q. Now, you stated that when you called upon Mr. Baker just prior to making this assignment he stated to you the amount of claims that had already been appropriated for by Congress and the amount of claims that he expected to collect. Did you
110 have any reason to suspect at that time the integrity of Mr. Baker at all, before you made the assignment, when you and he were discussing the question of selling out to him—did you at that time have any doubt of Mr. Baker's integrity and fair dealing with you?

A. None whatever. I will say that I had every confidence in Mr. Baker up to that time that I ever had in any man living. As I have often said, that if I was going to leave the country and be gone for four years I would not hesitate to take all my property and securities and put it down on Mr. Baker's desk and say, "Mr. Baker, I am going to be gone for some time," and when I come back again I have no doubt that I would have an entire and true accounting for the whole thing.

Q. That was your confidence in him?
A. Yes, sir.
Q. How long had you known Baker up to that time?
A. I have known Baker since 1860.
Q. I believe you said you had made his acquaintance at college. Did you know him before that?
A. No, indeed.

An adjournment was here taken until further notice.

111 SATURDAY, *April 16th*, 1892, at 3 o'clock p. m.

Met pursuant to agreement.
Present: Franklin H. Mackey, Esq., and H. O. Claughton, Esq., counsel for the complainant, and J. J. Johnston, Esq., counsel for the defendant.

Thereupon—

Mr. MACKEY: We offer in evidence this transcript from the Treasury Department, containing copies of certain drafts and warrants, with the indorsements thereon, and ask the examiner to mark the same.
(Which is filed, marked "Exhibit H. S. C. No. 1.")

Mr. JOHNSTON: The counsel for the defendant objects to the introduction of the paper now offered in evidence because it is incompetent, irrelevant, inadmissible, and immaterial upon the issues made in the pleadings in this cause, and his objection as made would be the same if the originals were produced or properly certified copies were produced wherein the Government would be a party and not to the improper certificate or improper filling up of anything connected with this exhibit. The objection goes, as above stated, solely as if the originals were presented.

An adjournment was here taken until further notice.

112 SATURDAY, *May* 28, 1892, at 3 o'clock p. m.

Met pursuant to agreement.
Present: Franklin H. Mackey, Esq., and H. O. Claughton, Esq., counsel for complainant, and J. J. Johnston, Esq., counsel for the defendant.

Thereupon—

Mr. MACKEY: The complainant offers in evidence a writing purporting to be copies of letters of Henry M. Baker directed to the first auditor of the Treasury, and it is agreed by the defendant that the said copies shall be read in evidence with all the force and effect as if the originals were produced, subject to any objection as to relevancy, incompetency, or admissibility of the said testimony; but the defendant does not admit in evidence the memoranda written at the bottom of each of said letters or the endorsements on said letters.
(Filed, marked "Exhibit H. S. C. No. 2.")

HORACE S. CUMMINGS, being called for cross-examination, was interrogated and testified as follows:

Cross-examination.

By Mr. JOHNSTON:

Q. Mr. Cummings, some time ago we called in writing for the production of certain letters and dates, all of which appear
113 from the memorandum. Are you ready to produce the letters called for?

A. I produced all that I have or all that I know of in existence.

Q. Have you produced any of the letters that we made a call for?

A. I have produced the following letters that were called for: that of August 13, 1889; September 24, 1889; October 4, 1889. The others that were called for I cannot find.

Q. Mr. Cummings, you have stated that you are a member of several bars of the various courts in the country. Please state the courts of the District of Columbia of which you are a member and when you were admitted to practice in those courts.

A. I never was admitted to practice in the District courts in the District of Columbia.

Q. State, if you please, whether or not the defendant in this cause ever urged you to become a member of the supreme court of the District of Columbia, of the Supreme Court of the United States, or the Court of Claims.

A. He never did to my knowledge.

Q. Would you be likely to recall it if he had urged you to do so?

A. I think I would.

Q. Did he ever offer to move your admission in any of the courts that I have named?

A. Not that I know of.

Q. Did you ever pretend or say that you were a member of the Court of Claims' bar?

114 A. I was admitted by the order of Judge Drake, in 1864, on a case—I can't tell the name, but it was a case involving the pay of certain naval people.

Q. Can you state why your name does not appear upon the printed roll of the Court of Claims?

A. I do not know but what it does. I do not know.

Q. Well, you may state your reasons, Mr. Cummings, that you gave to your late partner why you did not wish to become a member of any of the courts that I have named.

A. For the reason that I did not anticipate going into any business before the courts of the District, as I had been advised by an old and experienced lawyer that if I was going to make a specialty of Government practice that I had better attend to that entirely.

Q. Then you simply proposed to give your entire attention to claims before the departments and not any that might arise in the various courts?

A. In the various District courts, yes, sir; and I proposed to be

admitted to the Supreme Court of the United States whenever there was any occasion to practice before that court.

Q. Were you ever admitted before the court of Alabama claims?

A. I never was.

Q. Did you not have some claims before that court?

A. I procured claims before that court; but Mr. Baker expressed a disposition or a desire, if I may so express it, to practice in open court before the judges, and I was not willing to take charge of the active practice in the Alabama claims.

Q. That was your reason then?

115 A. Certainly; if he was not there to take charge of it I would have taken charge of it myself.

Q. What reason can you give for refusing to become a member of the bar of the Supreme Court of the United States?

A. Because I had never had any case that called me before that court.

Q. Now, Mr. Cummings, tell us how many cases you have ever argued in the Court of Claims.

A. I think it was four (4) cases in 1864. The argument consisted in proving the cases, submitting the cases, and asking for a judgment.

Q. What time did you resign your office in the Government?

A. 1873.

Q. Then you were a clerk in the department when you argued the case in the Court of Claims?

A. If I said '64 I mean '74.

Q. What motion and in what cases did you argue in the Court of Claims during the existence of the partnership between you and the defendant?

A. None whatever except these cases. I would take the testimony. I would apply to the then justice of the court in chambers for certain orders and certain rules, but I never appeared before the court to argue a case.

Q. Can you tell in what cases and in what courts you ever personally took the testimony in?

A. No; I cannot tell.

Q. Did you ever take any in any case pending in any of the courts?

116 A. I have procured testimony in the Court of Claims. I can't tell you in what cases they were.

Q. I mean did you yourself appear in any cases in the Court of Claims or in any other of the courts of the United States and examine and cross-examine the witnesses in cases pending?

A. I did not.

Q. Did you ever during the partnership employ any attorney to help you in your cases without the consent of the defendant or advising him about that?

A. I don't think I did; not to my recollection.

Q. Let me see if I can refresh your recollection. Did you not employ Lewis Abraham in the Huestis case in the Court of Claims?

A. I did, with Mr. Baker's knowledge and consent, because Mr.

Abraham held himself out as an expert in patents. This was the question involving the use of a patent by the United States, and I told Mr. Baker that these patents were something that I never knew anything about, and I thought it was the best way, to employ Mr. Abrahams if he was willing to take it on a contingent fee.

Q. Did Mr. Abraham take the testimony of the various witnesses in that case; if not, who did?

A. I think he did.

Q. You are not positive about that?

A. I am not positive about that. I think he did. I won't be positive whether he took it or got somebody else to take it.

Q. Well, what part, if any, did you take in a case settled in the Treasury Department in which John M. Vale was connected—

117 and give the name of the case—and how much fee or compensation did you receive in that case?

A. I don't know. I don't remember any such case.

Q. Did you ever divide or offer to divide that fee or compensation with your late partner?

A. I don't recall what the case is.

Q. You have no recollection of any such case, then, in which you were connected with Vale?

A. I have not any such recollection. I don't recall who Mr. Vale is.

Q. Are you acquainted with Mr. Vale?

A. I don't know any attorney by that name.

Q. Can you recall, Mr. Cummings, any case or claim in which you received money for your services while in partnership with the defendant or in cases received while such partner which you did not divide with him, other than those included in his suit at law against you?

A. I do not, in any cases where I ever received any fee.

Q. You were, I believe, at the time you were in partnership with the defendant an assignee of Henry D. Cook?

A. I was.

Q. Did you consult or obtain the permission of your then partner to become the assignee in that case?

A. I did it with his knowledge and he never made any objection.

Q. Do you recall what conversation passed between you and the defendant in reference to your taking the assigneeship of Henry D. Cook?

A. I do not remember any conversation on the matter.

118 Q. Was there anything said about what should become of the fees that you would receive as assignee; whether that should be considered partnership fees or whether you would receive the whole of them?

A. As I recollect it, at first there was nothing said about the matter of fees. When Mr. Cook failed he was owing me a large amount of money and I took the assigneeship for the purpose of seeing if by means of the assigneeship and of the fees coming therefrom I could in any way repay myself the amount that was due me.

Q. You then desired to pay yourself the loss incurred by the failure of Cook from the commissions as assignee?

A. Yes, sir.

Q. How long were you engaged as assignee?

A. I am still assignee.

Q. During the copartnership how much time did you give the duties of assignee?

A. It is entirely impossible to state.

Q. Can you say whether you gave one-half of your time?

A. No; I should not suppose I gave one-tenth part of my time.

Q. Then, what were you doing the rest of the time?

A. The same as Mr. Baker was doing and the same that I always had done ever since I had been in business.

Q. Do you recall how much commission you received as assignee of the failure of Henry D. Cook?

A. I have received none as yet.

Q. The estate is not settled up yet?

A. No; but I can state that the estate is indebted to me now largely.

119 Q. The estate is indebted to you by reason of your having become a depositor in the bank at the time of the failure of Henry D. Cook?

A. Certainly, and as the individual creditor of Mr. Cook.

Q. How much are those fees; how much are you entitled to as fees received from this assigneeship?

A. It is impossible for me to state.

Q. Can you approximate?

A. The sum that I had expected to charge H. D. Cook & Co. for services in the assigneeship was $15,000.00, which was to pay for services and the commissions on the collections and payments; that sum was fixed by me at that amount on the advice of Mr. John C. Bullett, of Philadelphia, who thought it was a reasonable amount.

Q. I hand you a paper and ask you if that is your report in that case?

A. It is, most decidedly.

Mr. JOHNSTON: I offer that paper in evidence.

(Filed, marked "Exhibit H. M. B. No. 1.")

Q. Mr. Cummings, when you entered into partnership with the defendant did you stipulate for any exception from the partnership contract for anything besides the cases that you had then pending?

A. My understanding was that I was to have the fees in cases that I had on hand, for which I held powers of attorney at the time and on which I had been at work, and which, to a great extent, were already prepared, and the labor after that was simply to procure a decision of the department. We also had the right

120 to take our own individual matters and to conduct them for our own benefit and our own emolument.

Q. My question was, did you stipulate for any exceptions from the partnership contract for anything besides the cases you then had pending?

(The WITNESS:) Please repeat that.

Q. Did you stipulate as an exception to the contract any other case or claim than those you then had pending when the partnership was formed?

A. The exception was this: That we had the right to take matters in which we were individually interested and to have matters of our own—that is, if Mr. Baker had a case arising out of a real-estate transaction or if he had an action against this person or that person he could take it and conduct it in his own behalf, and he was to have all the profits that came from it, and I had the same.

Q. My question, Mr. Cummings, does not refer to any private transaction or deals in real estate or stocks or anything of that kind individually, but it was as to any stipulation touching any case or claim against the Government or against anybody that might have a case in court outside of those cases then pending which you had?

A. I don't think there was any such a stipulation, except we had a right to take individual cases for ourselves, but when we took them it was known to each other.

Q. Were those claims against the Government?

A. Any kind of claims. For instance, I will say this, that Mr. Baker wanted to go into the pension business, and I said I did not want to go into it, and I said, "If you want to take those
121 cases and go in the pension business you are at liberty to do it and make all you can."

Q. Now, Mr. Cummings, was it not true that nothing was excepted from the partnership except the cases you then had pending, but, on the contrary, every claim or case that any one had against the Government that was brought into the partnership was to be treated as partnership cases, it made no difference who obtained the case?

A. That was the contract, as a rule, but we both had the right to have individual cases.

Q. You did, then, while you were a partner, obtain cases which you treated as individual cases?

A. I do not recollect that I did, but we had the right to.

Q. Was the Heustis case then pending when this partnership was formed?

A. It was, I think; I think it was pending.

Q. Did you have an agreement with the defendant that he had an interest in that case?

A. I did.

Q. Have you, since the dissolution of the partnership with the defendant, ever collected or received any fees or compensation in such cases received or begun by you during the partnership?

A. Not one dollar, to my knowledge.

Q. What interest did you agree with the defendant that he should have in the Heustis case?

A. One-half.

Q. Now state, if you please, what cases that were unset-
122 tled at the date of the dissolution of the partnership which

were received during that partnership, the name and amount of each and its present condition; also the fee to be received in each case.

A. I cannot state.

Q. Have you any knowledge on the subject?

A. I could by consulting my memoranda.

Q. You can make a statement of them?

A. I think I can.

Mr. JOHNSTON: I call for the schedule of them and file them at the next meeting.

Q. (Continuing:) Have any of those cases or claims been paid since the dissolution of the partnership?

A. None that I know of.

Q. Have you any means of ascertaining that they have been paid since the dissolution?

A. If they had been I think I would have known it.

Q. Mr. Cummings, did not the defendant suggest a dissolution of this partnership in April, 1889?

A. I do not recollect that he did.

Q. Have you any recollection why he urged the dissolution?

A. I have not; there never was any proposition to my knowledge.

Q. Do you mean to say there never was any offer by Mr. Baker to dissolve this partnership or that you don't recollect of any such offer?

A. Well, I should say that I would know of any offer on his part to dissolve.

Q. Now, Mr. Cummings, was not the sale to the defendant
123 of your interest in the so-called "inspector cases" one of the conditions upon which he consented to remain in the partnership with you in other matters?

A. Not at all, to my knowledge.

Q. You are positive of that?

A. I am positive of it.

Q. Did you ever express to him any dissatisfaction with the sale of 1886 until 1889, when he insisted upon an account of fees and expenses and a dissolution of the partnership in other cases?

A. I had no reason to be dissatisfied with the sale to Mr. Baker until the summer of 1888, nearly two years after the assignment was made, and it was only until I discovered that there were over $200,000.00 of cases, when, according to his representation to me, there was only $80,000.00.

Q. What was the date of the last general settlement you had with the defendant prior to 1889?

A. I cannot state.

Q. You mean that you have forgotten?

A. I have forgotten.

Q. Mr. Cummings, state why the defendant urged you for a settlement at various times between that time and 1889.

The WITNESS: What is that question?

Q. Had the defendant urged you for a settlement at various times between that and 1889?

A. Only for a settlement of expenses.

Q. Now, you can state why you did not join him in such a settlement.

124 A. If I recollect, we did have a settlement in '87 of expenses—possibly '88—and prior to 1888 I considered that Mr. Baker was in debt to me, and a balance was on my side rather then his.

Q. How did you consider he was in debt to you?

A. I will explain that. In 1875, I think, Mr. Baker wanted me to loan $1,000 to a friend of his in the Treasury, a Mr. Hellen, and he said that he would look after the money, and that if it was paid there would be a profit out of it, and that he would become responsible for one-half of it. I borrowed the money and loaned it to Mr. Hellen, and there was an order given upon the executor of an estate in which Mr. Hellen was interested that they would pay that order. He also had a life insurance. When the year was up and when the note was due the executors were not ready to pay that amount, although they, as I recollect, *they* had accepted that order. Suddenly Mr. Hellen died. We supposed that we would be made good from his life insurance, as that was one of the conditions that he made when the money was loaned to him, and to Mr Baker's astonishment, as well as my own, we found that the life insurance had run out, and the money was not paid by the life insurance company, as they were not under obligation to pay the same. I spoke to Mr. Baker once or twice, and we kept hanging on with the idea that the amount might be made out of the estate in which Mr. Hellen was interested, and I put the matter in the hands of Mr. Linden Kent—I think it was Mr. Linden Kent—to see if the money could be made, and it could not be, and finally, and when I considered that Mr. Baker was bound to reimburse me for one-

125 half of that money and the interest on the same—finally, in 1888, though I had said nothing to him in the meantime for several years, in 1888, after he had received this large amount of money, of fees in the inspector cases, he asked me one day, How about the Hellen matter? "Well," says I, "what?" "Well," says he, "I believe I owe you something on that." "Well," says I, "I believe you do." "Well," says he, "When you reckon up the amount with interest to date I will give you a check for one-half of it;" and that amounted to a pretty large sum of money, inasmuch as it had been running on interest for about 13 years. That amount was as much as I could owe Mr. Baker on account of the expenses, and therefore I considered that I owed him nothing on that account.

Mr. JOHNSTON: All of this answer is objected to as not responsive to the question.

By Mr. JOHNSTON:

Q. Now, let us get back. Was that a partnership transaction or an individual transaction?

A. It was a partnership transaction, because I made the loan at his suggestion, as I did not know Mr. Hellen.

Q. You then treated it as a partnership transaction for that reason?

A. Because it was upon his statement that he would become responsible for one-half of it.

Q. For that reason you treated it as a partnership transaction?

A. I did.

Q. Mr. Baker paid one-half, as he agreed to do, with interest?

A. Yes, sir; after a lapse of twelve years from the time that note came due.

126 Q. Did you ever say to the defendant in reply, when he urged a settlement, that you did not want one, "I am afraid I owe you money," or words to that effect?

A. No, sir.

Q. In your evidence-in-chief you say, "We discovered that the Government was not paying the inspectors of customs their full legal salary." Please state specifically what part you individually had in that discovery—what part you took individually in that discovery.

A. Mr. Baker had been conversant with the laws governing customs matters for many years, because he was engaged in the customs division in the Treasury. In reading the Revised Statutes of 1874 he read this law——

Mr. JOHNSTON: You will oblige me if you will answer the question.

The WITNESS: I am going to tell you, as you will see. He then said that he thought that there was money in that, and he said, "What shall we do?" and we came to the conclusion that the only way to do was to wait until time enough had elapsed, so that there would be an amount enough accrued under this law to the claimants. When some months had elapsed he said that he did not know how to go to work to reach the matter—as to what the Treasury would think of them. I said I thought I could easily find out. I went to Mr. Conant, who was an assistant secretary of the Treasury, and showed him that law. It was at his residence, on Capitol Hill. Mr. Conant looked at it and said, "Well, have you fellows found that out?" I said, "Yes, we have." I said, "What do you think of it?" "Well," says he, "I think there will be a

127 chance for a claim against the Government; but," he says, "we, of course, shall oppose it as far as we can, because we don't think that that was the intention of Congress when they ratified that revision." And he said, as a result, "Come up tomorrow morning and I will introduce you to Mr. Bristoe," or "we will see Mr. Bristoe." I went up the next morning and I saw Mr. Bristoe, and we had some talk about it, and he said, "Well, of course we do not want to pay these claims"——

Mr. JOHNSTON: All of this is objected to as hearsay, and the witness is instructed to answer the question.

A. (Continuing:) And I will also say that when I was talking

with Mr. Conent about this I said, "Now, I think Mr. Baker had better come in with me, because he understands this matter better than I do," and he says, "Don't have Mr. Baker come." I said, "Why?" He says, "Because Mr. Bristoe don't like Mr. Baker." The result of the conversation and the interview was very pleasant, and I came back and told Mr. Baker what the result of the interview was, and he was very much pleased.

Q. Now, Mr. Cummings, please answer what part you took in discovering these cases.

A. The finding out that these claims existed was nothing but simply reading the act of Congress—knowing what the old act was.

Q. Did you read this act?

A. I did.

Q. Did Mr. Baker consult with you about it first or you with Mr. Baker?

A. He spoke to me about it first.

128 Q. You never knew about it until your attention was directed to it by Mr. Baker. Then all you did was to run after Mr. Bristoe and to the Secretary and have a talk with them about it?

A. I did, sir.

Q. What else did you do?

A. I wrote as many letters as Mr. Baker did, because we wrote them together and in the firm name. The first powers of attorney were in the names of Cummings & Baker. I would write letters and Mr. Baker would write letters, and we would send them out, and I did all the work that I had to do and all the work that Mr. Baker ever asked me to do, not only then, but at all other times.

Q. Am I to understand that you personally wrote as many letters as Mr. Baker?

A. I did not say "personally," but I say that I wrote all that he asked me to do.

Q. You didn't do anything except what he asked you to do?

A. He had entire control of the cases.

Q. Did you know anything about them at all?

A. Only as he told me of the status of each case, because he kept the memorandum and all the books in his own possession, under lock and key.

Q. Did you ever see any of the letters that was sent in reply to the letters that you wrote?

A. I have seen many of them. Mr. Baker would be absent for weeks at a time, and I would attend to all the correspondence then, as far as I could.

129 Q. Do you mean to say, Mr. Cummings, that from the beginning to the end of the partnership, touching these inspector cases that you didn't know anything about them or didn't see the powers of attorney or papers except as Mr. Baker told you?

A. Except as he showed them to me, because he kept them in his desk, under lock and key.

Q. Don't you know his desk was open and all the papers connected with the partnership transaction all the time?

A. That part of the desk where he kept all these contracts was always locked. He kept them in the lower part of the desk. He had out one, two, or perhaps three books containing all the contracts, powers of attorney, &c.

Q. Now, Mr. Cummings, there was a photolithographed letter sent?

A. Yes, sir.

Q. Please state when the photolithographed letter was sent out how many such different letters were sent; also what you did in connection with securing the cases, preparing, arguing, or settling them.

A. In regard to the letters, at first we wrote the letters by hand; then we found that it took a good deal of work and manual labor; we then had them photolithographed, and he woul- take a list and I would take a list and we would both send our letters filled with powers of attorney. I would fill out powers of attorney and he would fill out powers of attorney and this photolithographed copy, with the power of attorney enclosed, we would put in an envelope and he would direct them and I would direct them, and in a great many cases the direction would be written by some person that Mr. Baker had hired for that purpose.

130 Q. Did not the defendant ask you for assistance in those cases on various occasions prior to September 6th, 1886, and tried to get you to generally help him with them? Did you do so whenever you could?

Q. He never asked me for any assistance in any case but that I not only willingly but readily granted under all circumstances.

Q. You say in your evidence-in-chief that the defendant locked his desk?

A. Yes, sir.

Q. Did he keep his desk locked any more after the inspector cases were in hand than he did before?

A. Not at all.

Q. No difference?

A. No, sir.

Q. Was there any difference in his keeping his desk locked before the sale than after the sale of the inspector cases?

A. None at all. He always kept the desk locked, and if it was not locked I had no business to look into it.

Q. You are not prepared to say that the key was not taken out of the door?

A. I don't think the key was in the door, and if it had been I had no business looking in his desk.

Q. Were not the parts of his desk containing the books and papers relating to the inspector cases usually unlocked during office hours?

A. I think all the documents containing the powers of attorney or the contracts were in that part which was always locked.

Q. Do you mean to be understood as saying that the
131 powers of attorney were kept by Mr. Baker locked up?

A. I have always supposed so, as far as I knew.

Q. Don't you know the fact, Mr. Cummings, as a practitioner in the department and a partner of this firm, that this was firm matter?

A. Certainly; but very often we would have powers of attorney on hand a long time before we filed the claim.

Q. Was that the case in these cases?

A. I think it was, in some cases.

Q. Are you positive that that was the case in the inspector cases?

A. I am quite positive, for in 1883, when the department would seem slow in adjudicating them or because Congress didn't seem inclined to make the appropriation, that we didn't think it was best to file many more cases in the department at that time; they were retained in the office then.

Q. Were not the keys to those parts of his desk containing the books and papers relating to the inspector cases usually during office hours either laying on the top of the desk or hanging in some of the locks, they keys to that part?

A. The books that he refers to were the Registers of the Treasury——

Mr. JOHNSTON: I am not asking you that.

A. (Continuing:) If those are the books that are referred to, I think he used to keep them in some side of his desk and some of them laid on the top of his desk.

Q. Were not the keys to those parts of his desk containing the books and papers relating to the inspector cases usually during office hours either laying on the top of the desk or hanging
132 in some of the locks?

A. They may have been; but if the desk was unlocked I should consider that I had no right to go into Mr. Baker's desk and overhaul his papers.

Q. You can answer that question neither in the affirmative or negative?

A. Whether it was locked or unlocked, I should consider I had no right to go into his desk to overhaul papers.

Q. My question was, didn't the keys remain in the locks or upon the desk or those parts of the desk containing the papers I have mentioned?

A. I can't say. I don't think they were.

Q. Were not the schedules of payment made by inspectors kept in the open part of the safe owned by you and to which at all times you had access?

A. The schedule of some of the payments were, but whether all I do not know.

Q. They might all have been there, for what you know?

A. They might; but I will explain this in regard to the safe: I had a safe in there; I took one part and Mr. Baker took one part,

and he used to keep his papers in certain places in the safe, but I considered that I had no right to interfere with his papers.

Q. You do not seem to comprehend my question. It is this: Were not the schedules of payments made in the inspector cases kept in the open part of the safe? I am not speaking of the private parts of the safe either one of you had.

133 A. Mr. Baker had a certain portion of the open parts of the safe and I had the same. What he had in the open parts of his I don't know. I presume that he had the schedules in there.

Q. Don't you know that these schedules were in the open parts of the safe?

A. I don't know. They might have been.

Q. Did you ever see any of them there?

A. I have seen papers that I supposed were schedules in there. The amount I don't know.

Q. Was there ever any attempt on the part of Mr. Baker to prevent your knowing all about those cases according to your own sweet will prior to the date you sold your interest in them, as per your receipt dated September 6th, 1886? If so, give particulars.

A. Mr. Baker was always ready to answer in regard to any specific case that I might ask him, as when he handed me the big bundle of powers of attorney, somewheres about the middle of August or the latter part of August, to examine into it, he said, "You can look them over and see what you think of them, and if there is any case you don't understand I will explain it to you."

Q. You didn't understand my question. Were you ever denied any information concerning these claims by the defendant prior to that date? If so, state how and when.

A. He never denied me any information in any specific case, but the only information I could get in a general way was that there were $20,000 to $22,000 that would be due on that lot of cases,

134 and there would be probably over $75,000 to $80,000 more of cases to be collected. That is the nearest of any information on the subject of the inspector cases that I could ever get.

Q. From the first case that was obtained in the inspector cases down to the date of the dissolution of the partnership, what case did you inquire of Mr. Baker touching anything connected with them or any information you desired to know?

A. That I cannot tell, but often I would ask him about this particular case or that particular case, and very often when Mr. Baker would be away I would receive letters and I would write to Mr. Baker, asking him, or else I would ask him how the case stood, or, if it was a pressing case, I would simply go over to the department and get the standing of the case and write the man out.

Q. Well, you had all the information in the office necessary to answer any letter without referring to Mr. Baker, did you not?

A. No, sir.

Q. Wherein was that information lacking?

A. Because I did not know anything about the particular case,

except as a man would write and say that he had a claim against the United States for arrears of salary as inspector, and he would want information to know how his case stood. I could not tell or know anything about it until I went over to the department and found out as to the status of the case, without Mr. Baker was present, and in those cases I would hand the letters over to Mr. Baker and he would attend to it.

135 Q. Then you could not answer these letters because you had not kept yourself advised how these cases progressed, and you exercised yourself to that extent, did you, to advise yourself?

A. I could not.

Q. Why?

A. Simply because it was a matter under Mr. Baker's own control, and if I would ask him he would say, "I will answer that," and he would write the letter himself.

Q. Why, as a partner, did you not keep pace with all the information necessary to give your clients the information desired?

A. For this reason, that when we went into partners- we divided up the business; Mr. Baker took certain cases and I took a certain class of cases—in the admiralty cases and in the vessel cases—all that I took, and Mr. Baker knew nothing about them. He took the inspector cases, for he knew all about them. He had been a clerk in the Treasury and knew the rules of the revenue law and what the custom law was, and I could not by any amount of study become as posted as Mr. Baker was.

Q. Now, Mr. Cummings, you started out in the beginning knowing as much as Mr. Baker and doing as much work as Mr. Baker and writing as many letters as Mr. Baker. State, then, how it was that your memory had become a blank as to the condition of these cases from the first—that you never gave information that clients would write for.

A. If you understand these cases you will know that an inspector—when the power of attorney and the contract annexed was received Mr. Baker would take them and he would look through the Treasury Registers and get what other information he could from the department and see what, if any, money was due as

136 each case came. When he was satisfied that the man had a claim he would write a letter to the Treasury Department, stating that as attorney of this person, whose power of attorney was annexed or enclosed, he applied for the arrears of salary due this person under the Revised Statutes for performing the duties of an inspector of customs between this day and that day, and enclose the power of attorney, and he kept track of them. I probably knew, if not as much as Mr. Baker, I knew enough to be posted in regard to these claims, but as to the condition of each claim I knew nothing, because Mr. Baker kept track of them the same — I did in my vessel cases that I had charge of. I presume that Mr. Baker knew very little of the standing of each case except as I informed him and as he asked me.

Mr. JOHNSTON: This answer is objected to and the question repeated.

Q. Now, Mr. Cummings, you started out in the beginning knowing as much as Mr. Baker and doing as much work as Mr. Baker and writing as many letters as Mr. Baker. State, then, how it was that your memory had become a blank as to the condition of these cases from the first—that you never gave information that clients would write for.

A. I didn't say that I did as much work as Mr. Baker or that I wrote as many letters as Mr. Baker, but I simply say that I did all that Mr. Baker ever asked or requested me to do.

Q. How is it that you didn't know anything about the business?

A. Simply because Mr. Baker took exclusive control of them.

Q. Then you thought it was an easy job when clients wrote for information to refer the matter to Mr. Baker for reply than
137 to go to the Treasury Department and get the information?

A. Because Mr. Baker knew the information and could probably answer without going to the department.

Q. Did you not want to know the information yourself?

A. Certainly; but I had my other business. For instance, the first year after we had gotten an appropriation for these inspector cases, in 1876, I won cases in which I took $28,000 of fees, in which Mr. Baker had one-half; and I will say that they were cases in which I had the power of attorney and contract and had nearly completed the cases ready for settlement prior to the time that Mr. Baker came into the firm, and cases which, according to a strict construction of the contract, he would have had no right to the fees at all, but I simply gave him one-half of those fees.

Q. Name the cases, please.

A. It was the coal case in New Orleans and the St. Charles and Anglo-American case—two steamers in New Orleans.

Q. Mr. Cummings, inasmuch as you never personally superintended the taking of testimony in any of these cases that were either in the department or in the Court of Claims and never argued any of them, was it not astonishing that Mr. Baker should know something about all the cases?

Q. The WITNESS: About what case?

Mr. JOHNSTON: About all of the cases.

A. He never had anything to do with any cases that I had except this coal case that I have mentioned. I learned that the original voucher in that case was in the hands of Gen. Charles Ewing, who was the successor in business of Browning & Ewing. I,
138 knowing that Mr. Baker knew the people connected with Mr. Charles Ewing, wrote to him from Pittsburgh to please go at once to Charles Ewing and see if he could not get the old papers in the New Orleans coal case, as they would be of great value to us. I wrote to him to do it at once, as I was delayed in Pittsburgh several days. When I got back I found that he had gotten those papers. But I will say, in regard to the case, that I never asked Mr. Baker's help or anybody's assistance in any case that he ever

had any interest in any of the departments at any time, with this one exception, in the coal case, in getting the voucher, and also in the Philbrook land case, that we had in the Interior Department, known as "The Little Rock case," in which I did a great deal of work and Mr. Baker did work, but I did far the most of it, and it was tried in the district court of Arkansas and came to the Supreme Court on appeal. I wrote the brief in that case and Mr. Baker made some amendments, and he, having been admitted to the Supreme Court of the United States, *he* argued the case there, and we lost it, and I think we ought not to have lost it.

Q. Did Mr. Baker ask you to be admitted to the Supreme Court of the United States and argue that case yourself?

A. He may or may not, but I presume he may have done it. I don't know.

Q. Mr. Cummings, what cases, if any, did you have in the Court of Claims that required argument?

A. None.

Q. Did you have any cases there that required the taking of testimony?

139 A. No, sir.

Q. What cases did you have in the department that required argument, and how many of the cases did you argue?

A. A great many, and I argued every case in the department.

Q. The inspector cases too?

A. No, sir; I say with that exception, because that was Mr. Baker's own part of the work.

Q. Did you ever argue any of the moiety cases there?

A. No, sir.

Q. Then you didn't argue them all?

A. That is part of the custom work. Mr. Baker took charge of the customs business.

Q. That includes the inspector cases?

A. Yes, sir.

Q. That was the largest amount of business you had, was it?

A. Yes, sir; for 1881 and after.

Q. Mr. Cummings, I wish you would tell us how it is that you manifested such general apathy in the inspector cases, about the largest amount of business you had.

Q. I never manifested any apathy; on the contrary, I was anxious and agreed to do all I could, and to always do, under all circumstances, everything to promote the interest of the business, and if I did not do more it was just simply because Mr. Baker would not tell me what to do.

Q. Can you tell us what you ever did do?

A. I wrote letters and powers of attorney and trotted over to the department when Mr. Baker was not there, and in 1878, 1886, and in 1888 he was away a great deal, and in 1887 he was away

140 considerable of the time, but in 1887, as I recollect, there was but very little done, because Congress had refused to make appropriation for the years 1886 and 1887.

Q. Is that all you did?

A. I did all there was to be done.

Q. Mr. Cummings, did you get all the books and papers connected with the inspector cases which were delivered to you, as stated in the answer of the defendant on pages 16 and 17 of the printed record?

A. I don't know what that refers to.

At this point an adjournment was taken until Thursday, June 2, 1892, at 3 o'clock p. m.

THURSDAY, *June* 2, 1892, at 3 o'clock p. m.

Met pursuant to adjournment.

Present: Counsel for the respective parties.

Whereupon HORACE S. CUMMINGS, being recalled, was further interrogated.

By Mr. JOHNSTON:

Q. (The defendant, having taken with him Exhibit H. S. C. No. 2 for the purpose of ascertaining the correctness of the amount on the back of each letter, now returns the said exhibit and admits that the amounts of the claim on the back of said letters are correct and represent the amount allowed in each case.)

(It is further agreed that the letter dated December 1st, 1879, presenting the claim of David S. Beetle, of Edgartown, Massa-
141 chusetts, was not allowed upon the said application, but upon a subsequent application and a power of attorney dated the 12th of April, 1888, and that the letter dated April 16, 1888, presenting the claim of Samuel E. Johnston, was filed in the department subsequent to the execution of the paper dated September 6, 1886, and claimed by the plaintiff to be the bill of sale to defendant Baker, and that the amount allowed on said subsequent application was the sum of $3,698.53.)

Q. Mr. Cummings, did you get all the books and papers connected with the inspector cases which were delivered to you, as stated in the answer of the defendant, on pages 16 and 17 of the printed record?

A. I did not receive all the books and papers mentioned by the defendant in his answer to the bill. Some time in August, 1886, Mr. Baker gave me three large scrap books, containing in the vicinity of one thousand contracts. He gave me a number of Treasury Registers. He gave me a list of cases that had been filed in the department, but which were either tied up or disallowed and which he called "doubtful." He gave me a list of cases in which the fees were of other amounts than the regular amount of twenty-five per cent. He gave me a list of cases, also, of those persons who had claims, but which he had been unsuccessful in getting, but I never saw any list of cases that were filed and was not in the department at that time. Those papers I took home. The second morning after receiving the papers Mr. Baker asked me if I had come to any conclusion. I told him that I had not and did not see as I could, be-

cause there was nothing in the papers to show whether the claim of this person or that person consisted of an amount of $1 or $1,000, and each case involved a calculation and an inquiry from
142 him and an examination of every claim covered by the whole thousand powers of attorney. Many of the cases had had one allowance, some had had two, and there was nothing to show in the papers what the case amounted to generally, in the whole or individually. I kept the papers about a week, when I returned them to the office and told Mr. Baker that I could not make any calculation upon them without we sat down and went through each case, but that he (Mr. Baker) knew how the cases stood and that he could give me an approximate amount of what cases were filed and the probable amount of the allowance hereafter, and it was upon his statement to me then, viz., that there was probably $75,000.00 and possibly $80,000.00 more of claims, that I acted.

Q. What books and papers mentioned in the pages 16 and 17 of the printed record that you didn't get?

A. I never received any list of cases then pending in the Treasury Department except the list of cases that he called "hung-up cases" or "doubtful cases" or "suspended cases."

Q. Will you name all the books and papers that you didn't get?

A. Well, I could not name all the papers that I didn't get, because that would include a great many. I have named all the papers that I did get.

Q. Now what papers were there that you didn't get that would enable you to go over satisfactorily to show what was the amount of these claims?

A. I could not state because I do not know whether there were any papers or not that would enable me to form an adequate idea of the amount of these claims.

Q. Are you able to say that Mr. Baker didn't give you all
143 of the papers in those inspector cases?

A. I cannot say, because I do not know what list he had. I have stated all that he gave me.

Q. Were there any other papers necessary in those cases to enable you to reach a conclusion as to the results and the amounts of those cases?

A. There were no papers given me that would enable me to reach any conclusion except, as I have stated, to take each case and the whole mass of contracts individually and go through it and make a calculation, find out from Mr. Baker what had been allowed, and to ask him individually in regard to each case.

Q. Then, as I understand you, Mr. Cummings, none of the papers or books handed you by Mr. Baker would give you any information at all as to the character and position and results of those cases?

A. There was no doubt as to the results of the cases if the facts and the amount could be arrived at. Those could only be arrived at by the individual calculation in each case, and I had nothing to show whether there had been previous allowances, whether there

was anything in the case why they should not receive the whole *per diem* as provided by statute.

Q. When the cases came into the office were they put into a book, with the name and with the amount of the claim*ant*?

A. No, sir.

Q. How were those cases preserved so as to give you the information whose cases they were and the date of them and the amounts that they claimed?

A. Mr. Baker knows. I can't say, because he kept them
144 entirely in his own jurisdiction.

Q. Did you know that there were such papers in the office?

A. If there was I never saw them.

Q. You did not?

A. I don't know. If there were I never saw them. When we went into business together we kept no books, except a book that I had prior to Mr. Baker's coming in with me; but those things never were entered upon those books.

Q. You never kept a book of them at all?

A. Except as Mr. Baker kept them, on a sheet of paper in his own possession; but in book form I have never seen them.

Q. Did you ever have those sheets of paper that you have mentioned as the way in which they were kept by Mr. Baker?

A. I may have seen some of them, but never to examine them, except for some individual case when Mr. Baker would ask my assistance.

Q. You went all over the papers and books that Mr. Baker had given you while they were in your possession, didn't you?

A. I did not.

Q. Did you examine any of them?

A. I examined the powers of attorney, some of them. I examined the Treasury Register. I looked them over, but I saw at once the uselessness, except at the expense of a very long calculation, involving weeks of time, of reaching any adequate idea of the amount or value of these claims. I knew that Mr. Baker knew, and that was sufficient for me.

Q. Well, then, why did you take the papers and pretend to examine them if you did not do it?

A. I did not pretend to examine them. He asked me to
145 take the papers and I took them home to examine them, and when I saw what they were I saw that it was useless for me to undertake to make a calculation upon the amount of those cases, as I would have to consult Mr. Baker in every individual case.

Q. What did Mr. Baker want you to examine?

A. I don't know.

Q. What did he tell you when he handed you the papers?

A. He just said, "Look them over."

Q. Did you ask him for the papers?

A. I did not.

Q. He voluntarily handed you the papers as being papers connected with the inspector cases, didn't he?

A. I supposed that there was something in there that would give an adequate idea as to what the amount of the claims would be.

Q. Mr. Cummings, did you ever examine the House executive documents of the first session of the 49th Congress No. 70 and 225, showing the whole amount of allowances paid to inspectors and being the documents handed to you by Mr. Baker?

A. I can't recognize it by that description.

Q. Well, can you recognize any document among the papers handed to you by Mr. Baker being a report in the House of Representatives touching the inspector cases?

A. I cannot by that name, but if he will show me the papers I will say at once.

Q. Can you recollect any paper by any name that you may please to baptize it showing any case in the House of Representatives?

A. If Mr. Baker will say what papers he refers to——

146 Q. Showing the whole number of the allowances in favor of the inspectors?

A. If he called it to my attention I examined it, because I examined whatever he gave me.

Q. Now, did you at any time ask Mr. Baker to go over these cases with you?

A. I did not.

Q. Why didn't you do it?

A. Because I asked him what the whole amount was, and he said from $75,000.00 to $80,000.00 more of cases, and I took his representation.

Q. You were satisfied with that without going any further into it?

A. I was satisfied that that was true.

Q. You have said that some of the letters written in the inspector cases were written by hired persons. Please state who was in the office that did such work.

A. A Miss Sarah A. Latham came there and was engaged by us and paid for writing these letters, and I will say, also, as far as my observation went, that a large number of these letters, copies of which were introduced and admitted, was in Mrs. Latham's handwriting; at any rate, in the handwriting of a lady and not in Mr. Baker's handwriting.

Q. What does the power of attorney in each one of these cases show?

The WITNESS: What do you mean?

Mr. JOHNSTON: Does it state the amount that the claimant claims?

A. No, sir.

147 Q. Does it state the amount of fees that you were to receive?

A. I will state this: I prepared the form of power of attorney; it was the abbreviated form from that in general use, printed on the same sheet as a contract for fees, in the shape of a letter directed to Mr. Baker and signed by the claimant, but there is nothing in the power of attorney to show what the amount of the claim was, ex-

cept for the arrears of salary due him for performing the duties of inspector of customs, and the same phraseology was used in the contract annexed to the power of attorney, which went on to provide that the attorney should have a contingent fee of twenty-five per cent. in case of success.

Q. How did you ascertain the amount that each person claimed?

A. Mr. Baker ascertained that by taking the information that he had gathered from various sources—Treasury Registers and otherwise—including the time that the man was in service, and seeing the amount that he had received, then calculating the amount that he was entitled to receive under the Revised Statutes, and the difference was the amount that was claimed. Then the whole case was proved up by documentary or record evidence and there was no testimony taken orally; no testimony taken orally, but in many cases there were filed affidavits of the claimant, stating his services, and that he was on duty at all times and either did service or was ready and present to do service. Many of those affidavits were prepared. I know myself that I typewrited a great many of them that were of the same character except as to the name of the claimant, the time, and the location.

Q. What I wish to know is this: Were not the several
148 amounts that were found to be due to the respective inspectors made out from the report or documentary evidence in the office of the Treasury Department and the Revised Statutes of the United States?

A. I expect that they were.

Q. You know of no other mode of ascertaining the amount of services for which they were to be paid than that I have just mentioned?

A. I know of none other.

Q. These documents were all accessible to any gentleman that wanted to look at them, I suppose?

A. I don't know; I never went over them to investigate.

Q. Did you prior to the date of your receipt to the defendant for $15,000.00, paid for your interest in the inspector cases, ask him for any books or papers or for any information that would enable you to ascertain their then value, and he refused to give them to you?

A. I don't know, and I don't think that I ever asked him for any papers, except for his own information and his own knowledge as to how many claims there were and as to how much money was then due us as fees in the cases that had been allowed in 1886.

Q. My question was, Did you ever ask him prior to his purchase from you for any books or papers or any information which would enable you to ascertain their then value?

A. I never did, for I never conceived that there was any possible use in it, as he knew the standing.

Q. Consequently, then, he never refused to give you any
149 books or papers. Am I right?

A. I think you are right.

A. In your examination-in-chief you referred to a memoranda made by you and you say you have lost it.

A. Yes, sir.

Q. (Handing witness paper.) Is this a true copy of it, as far as you know, and are you willing that it shall be filed as an exhibit in your testimony?

An adjournment was here taken until Monday, June 6, 1892, at 3 o'clock p. m.

150 MONDAY, *June* 6, 1892, at 3 o'clock p. m.

Met pursuant to adjournment.

Present: Counsel for the respective parties.

Whereupon HORACE S. CUMMINGS, being recalled, was further interrogated.

By Mr. JOHNSTON:

Q. (The last question asked at the foregoing session was repeated to the witness by the examiner, to wit (handing witness paper): "Is this a true copy of it, as far as you know, and are you willing that it shall be filed as an exhibit in your testimony?" who made answer as follows:

A. I have examined it, and I cannot say whether it is a true copy or not, but in the main I should say that it was very near it. I am willing, as far as any material facts contained in it as to showing the relations between myself and Mr. Baker, or showing the state of my mind or understanding at the time are concerned, but I am not willing that it should be filed as a paper for reasons which I will give. First, that it is immaterial and irrelevant to any question that I have raised in this case. Second, that it is a breach of confidence on Mr. Baker's part, as it is a confidential memorandum made by myself in haste upon various slips of paper on the typewriter, in which there were erasures, interlineations, and additions and never revised by me, as I intended it only for my own use, and never seen by or read to any other person than Mr. Baker—entirely confidential and personal—the
151 same as a talk would be between two persons. Mr. Baker asked the next day, I think, if he could make a copy of it. I said, "You certainly can, as I have nothing to conceal, but you must remember that this is between you and me." I never saw Mr. Baker's purported copy until shown last Wednesday. I see that it is in the handwriting of another person than Mr. Baker, showing that if this copy was made at that time he had since shown it to another person. I know afterwards, when Mr. Mackey, in a conversation with me, said that he had been talking with Baker and that Mr. Baker had shown him a copy of the paper that I had written and that I had allowed him to make a copy, I said, "Yes, I gave him permission to copy that paper;" and Mr. Mackey, as I understood him to say at the time, — that it was in Mr. Baker's own handwriting. This paper is perfectly well understood by Mr. Baker and myself. Any allusions as to the relations between him and myself I am perfectly willing and ready to admit. Any allusions to other persons, which have no relevancy to the case, I am not

willing to admit, because they have no bearing on the case, and they would be apt to do injustice to some persons named in them. Mr. Baker knows very well the circumstances and why I made the reference that I did.

Q. Mr. Cummings, then the only objection that you have to that paper is it makes reference to parties not connected with this suit; am I right?

A. I think you are, in the main, right.

Q. Now, can you recollect anything that was in the paper you wrote that does not appear in this paper handed to you?

A. It would be impossible for me to recollect things that I wrote not included in that paper, but there are things in
152 that paper that I hardly think that I wrote.

Q. Are you willing to say that there are things in the paper that you have before you that were not in the paper written by you?

A. I am not willing to swear to that fact, although I believe——

Q. Give the basis of your belief why there are things in this paper——

A. (Interrupting.) Because no such things were ever in my mind at any time.

Q. What things?

A. Certain references that he made.

Q. Please state what references are in that paper that was not in your mind at the time the original was written by you. More particularly, "As I had two long interviews with Judge Richardson on the matter and gave him the various reports and decisions on the matter by the solicitor and others and told him that in it was a matter of life or death with us, and that he must stand by us, and he said that he could make no promise, but he would look out for me. The case was successful." Do you desire that the court should understand you in your testimony as saying that what you have just read was not in the paper that you wrote?

A. Not all of it.

Q. What was not in that paper that you wrote that is in this, touching the interview with Judge Richardson?

A. I would say this, that I do not think that anything like this, viz., "and he said that he could make no promise, but he would look out for me"—that phrase was in it.

153 Q. You say you did not write that in the original?

A. I don't believe that I did.

Q. You are not willing to say you did or did not?

A. I can say as far as this, that I do not believe that I did.

Q. But you are not willing to say that you did not put it in your original, or that you did put it in your original?

A. Well, it is asking a great deal for a man to swear to something that he didn't do, but I can say that I do not believe that I did do it.

Q. You are willing to go no further than to say that you now believe that you didn't put the phrase that you have read in the original?

A. I will say that I do not believe that I ever wrote any such phrase.

Q. And that is as far as you are willing to swear on that subject?

A. I am not willing to swear any further than that, only to say that I do not believe that I ever wrote such a phrase as that, for the reason that no such thing was ever in my mind. I will explain the matter about Judge Richardson. When these claims were in the department and action was either refused or very slow and they were sent to Congress, and it was a question as to what Congress would do, Mr. Baker and I talked over the situation, I acting under Mr. Baker's advice, because he was the most conversant with the details of the cases, and it occurred to us that the cases might go to the Court of Claims, and, knowing that I was a friend of Judge Richardson, he asked me if I could not interview the Judge and get some idea of what the de-
154 cisions and bearing of the Court of Claims were. Mr. Baker posted me; he gave me the decisions of the solicitor and all the other papers there were bearing on the case. I went to see Judge Richardson one day. I opened the Revised Statutes and I pointed out to him the new law and I showed him the old law. I then stated the case. He asked me, "Mr. Cumming-, is this case pending in the Court of Claims?" I said, "No, it is not, and I don't know as it will." The Judge and I then talked over the case and he gave me some references to cases not analogous to this, but as near as any of the decisions *as* the Court of Claims went on this subject, and the result was that his opinion seemed to be favorable. Afterwards I met the Judge on the street one day, as I went frequently up that way, and I said to him, "Judge, those cases have been referred to the Court of Claims. Says he, "What cases?" I said, "The inspector cases that I talked with you about." He said, "Have they?" He said, "Well, we will look after that." Then I said, in a laughing way, "Well, Judge, you have given a sort of an expression to me that you thought those cases are right; now I expect you to stand by us." It was the life or death of those cases.

Mr. JOHNSTON: So much of the answer of the witness that is not responsive to the question is objected to.

Q. Now, Mr. Cummings——

A. (Interrupting.) I will say that when the cases did come before the Court of Claims that it was considered and decided favorably, the decision being given by Judge Weldon.

Q. Mr. Cummings, is it not a fact, however, that what is written in that paper touching the conversation that you had with Judge Richardson did take place, did it not?

A. The conversation took place as I have related it.

155 Q. It was a fact, was it not, that it stated in this paper about the conference or interview you had with Judge Richardson?

A. It was a fact, just as far as I have stated it in my statement

at this time and no further, and I will also say that I went and talked the matter over with Judge Richardson the other day.

Q. What did you talk it over with him for?

A. So to be sure.

Q. About what—whether you had put it in the original paper or left it out?

A. No.

Q. What was your purpose in asking Judge Richardson about it; to be sure of what?

A. To see if he could remember the conversation.

Q. Not the fact that you had put it in the original paper?

A. To get at the truth of it, whether it was in the paper.

Q. Why did you want to ascertain the truth of it from Judge Richardson?

A. The reason was this: I had a case pending in Congress in which the committee thought that we could go to the Court of Claims and I denied that the Court of Claims had jurisdiction. In order to make sure I went and stated the case to Judge Richardson and asked him if the Court of Claims did have jurisdiction, and he thought it over and he said, "No," and that conversation brought on this conversation.

Q. What other things are there in this paper that were not in the original paper?

A. I cannot state, but the tenor of the rest of the paper
156 is according to my general recollection.

Q. Now, you say that that paper was to be a secret between you and the defendant, the same as any other partnership talk.

A. It was, most positively.

Q. Did it not contain expressions that Mr. Baker had overreached you or had attempted to cheat you, and if he did, why did you want to keep it secret, if you had in contemplation to institute the proceedings against him?

A. Because it was Mr. Baker's business and my business and nobody else's business.

Q. Now, did not your bill in this case contain similar expressions that are in that paper?

A. I cannot say.

Q. You have read the bill, I presume?

A. About two years ago.

Q. You read that paper a day or two ago?

A. I did.

Q. What was your purpose to keep it secret if Mr. Baker had defrauded you?

A. It was not a question of secrecy. It was just simply a question of my own business and his business.

Q. Now, tell us when you showed that paper to Mr. Baker after you had written it?

A. I should say somewhere about the first part of August, 1889.

Mr. JOHNSTON: I now offer that paper in evidence and ask to have it marked:

(Filed, marked "Exhibit H. M. B. No. 2.")

157 Mr. CLAUGHTON: The plaintiff objects to the admission of this paper in evidence as a whole. So far as his testimony tends to establish that, according to the best of witness's recollection, this is a copy of the original paper. He does not object to the introduction of the paper upon the ground that it is secondary evidence. With this explanation, he objects to such portions of that paper as make reference to officers of the Government, which, in their nature, are private and confidential and to the introduction of which as testimony the witness himself has objected, because the paper was handed to the defendant for his private inspection, and the attempting to offer it is a breach of confidence. The plaintiff does object to those portions being read in evidence in this case upon the ground as stated.

Mr. JOHNSTON:

Q. You say in that paper that you tried to work up some outside business, but you didn't succeed. Please tell us what was the character of that business.

A. There were a good many schemes that were offered to me, but one business in particular. I wished to go into the business of collecting what was known as "postmasters' claims." I had a talk with Mr. Harvey Spalding, who had a large amount of them. I had gotten pretty well acquainted with the practice and details of the claims. I went so far as to get copies of all the papers. I wished Mr. Baker to go in with me, and he said he did not think it was exactly right to do, as it would be a cut into a brother attorney's business. I did not go into it.

Q. What was the class of business you meant when you used the term "work up some outside business"?

158 A. Certainly; that meant any kind of business other than the business we had.

Q. And you consulted with Mr. Baker upon the subject of doing it?

A. I did.

Q. What did he do?

A. He didn't think it was a good idea.

Q. And acting upon that, you didn't go into it?

A. I dropped it.

Q. Now, tell us, if you please, at what day you committed your thoughts to writing.

A. I will say, in the first place, that I made a memorandum on the typewriter, in a crude way, along from the first part of August, 1886——

Q. I am asking you, Mr. Cummings, when did you commit your thoughts to writing?

A. I will tell you how I came to do it. On the 6th of September, 1886, when Mr. Baker gave me his check for $15,000.00, he went away the same night on a little trip somewhere. The next day I was all alone. I took my memorandum of the days before and I simply enlarged upon it in a crude way, upon various slips of paper,

for my own guidance after that, and I put it in my drawer, and it was either on the 6th or 7th of September that I wrote the memorandum.

Q. What led you to reduce in writing all your thoughts previous to the 6th of September, 1886?

A. Because it was a habit that I had, and I can produce a great many memorandums on different subjects and on different occasions.

159 Q. Did you anticipate previous to September 6, 1886, that Mr. Baker was overreaching you?

A. No, sir; I did not.

Q. Why did you make a memorandum anterior to that date and incorporate in it your thoughts?

A. I had been in the habit of doing that on a great many occasions, on different subjects and with different persons, and that's what gave rise to this, was the persistency that Mr. Baker indulged in in claiming that I had nothing to do with the cases, in the management of them, and practically that I knew nothing about them.

Q. Where is that original memorandum in which you wrote your thoughts?

A. I have it here. That was the basis of the original writing at the time and on the date that it purports.

Q. This seems to be only one sheet. Where is the rest?

A. That's all there is.

Q. When was this written?

A. On the dates which they purport to be written on.

Q. Mr. Cummings, why didn't you show that paper to Mr. Baker before 1889?

A. Simply because I could not tell whether there had been any misstatement or disception on his part until two years after.

Q. But you believed it on the very day that you made the sale to him?

A. I did not.

Q. Why did you wait a year after the two years that you said that it would enable you to tell whether he had misrepre-

160 sented to you before you brought suit?

A. Simply because I had the right to do so.

Q. You say that on the 6th of August, 1886, the defendant handed you the paper wherein you sold to him the interest in the inspector cases for $15,000.00, and you signed it, and at the same time he handed you a check for $15,000.00, being the consideration therefor, and that on that night or the next morning the defendant left town for New Hampshire; that he also handed you the schedules and requested you to go on collecting the fees, and that he also left you his check book signed in blank; that the amount of claims that had been adjudicated and which were in the process of collection you discovered in a day or two after defendant had delivered you the schedules, which schedules contained the name, the amount, the fee, and all the data pertaining to each case, and that it was very hard for you to reconcile the amount of fees that the defendant said

and the amount of fees that were in the schedules, and on that occasion you sat down and made a private memorandum for yourself, giving your impressions of the matter, wondering as to whether you had done the best or not, which you preserved for some time. Is the paper that I handed you and to which you have testified the same memorandum that you then wrote?

A. I presume the greater part of it is, but as to the same I cannot say.

Q. Were all of the papers and schedules you have testified to the same papers the defendant handed you before you signed the paper of September 6, 1886, which you took home to examine?

A. No, sir.

161 Q. What papers were there that he didn't hand you?

A. The only paper that he handed me when he went away was simply the statement of the allowances that were made under the appropriation of August, 1886, and no other papers.

Q. Were not the list of the cases and the fees received in 1886 among those papers?

A. They were; it was on the list.

Q. Was it the day after you sold your interest in the said cases and while you had the papers in your possession that you discovered that the defendant had overreached you?

A. I did not discover that the defendant had overreached me then.

Q. What was it that you discovered that caused you to reduce your thoughts to writing the day you did sell or the day after?

A. It was simply the fact that Mr. Baker had, by his importunity, forced me to make a sale, and those are simply my thoughts on the occasion. I had no reason to believe then that Mr. Baker had overreached me.

Q. When did you discover that Mr. Baker had overreached you?

A. In the summer or fall of 1888.

Q. What facts did you discover that the defendant had suppressed between the 6th of September, 1886, and the date of the paper filed as your thoughts that you didn't know before you sold out your interest in the cases to him that you didn't know at the time of sale?

A. When Mr. Baker bought the interest from me he said there was about $75,000.00 or possible $80,000.00 more of cases under the session of 1886 and 1887. No deficiency bill was passed; therefore nothing was done about those cases wherein

162 I could discover anything in the session of 1886 and 1887. Congress on the first day of November, 1888, made an appropriation of $73,226.72 to pay these claims. It struck me then that Baker was pretty near right in his estimate of the cases, but on March 30, 1888, Congress made another appropriation of $62,661.37 to pay similar claims, and I will say that when these two appropriations were passed Mr. Baker asked me to help him and I did. He drew up the form of the letter transmitting the power of attorney to cash the draft and I filled out nearly every one of the powers of attorney that was sent out to collect those drafts, or at least a great many of them. He wrote the form of

letter and I printed them all on a copy machine and did all the work that I could. During that time Mr. Baker was out of town at times. He went away on two occasions. I went on collecting some of them.

Q. You have testified to that before——

A. This was two years afterwards.

Q. Now, Mr. Cummings, will you be kind enough to answer my question?

A. I will say that on the 19th of October, 1888, Congress passed another appropriation of $110,666.64 to pay these claims, and that was the first that aroused my suspicions in the matter.

Q. Are you willing to swear that all those appropriations were made for all those claims or for claims that were in the hands of Mr. Baker at the time?

A. I don't know whether Mr. Baker controlled all the claims or not, but I know this, that he controlled nine-tenths of
163 those claims.

Q. How long did you know that fact, that he controlled nine-tenths of them?

A. I have known it for years, because no one else had any of these claims. One or two attorneys undertook to collect them, but they didn't seem to make much headway.

Q. Tell us how you acquired that fact.

A. Simply because for years, when the appropriation bill had passed, I would help Mr. Baker fill out the powers of attorney and prepare the letters for transmission, and as I would fill up a power of attorney he would give me the list of names and the congressional document containing the allowance, and from that list of names and addresses that he gave me and the congressional documents I would make out the power of attorney and check them off.

Q. Did the papers you had in your hands show the amount of the claim and the amount of fee?

A. No, sir.

Q. What was that power of attorney for?

A. It was to indorse the draft to collect the money. It would be a power of attorney from blank to Henry M. Baker, of Washington, D. C., to indorse draft No. blank, issued on inspector warrant No. blank for the sum of blank, and to receive the same for me. I will say that when the appropriation was made for $110,000 and over on October 19, 1888, Mr. Baker was considerably worried as to whether he would get those drafts or not, because in the fall previous the Secretary of the Treasury had issued an order
164 which forbade the giving of drafts to any one except the claimant, and Mr. Baker was anxious that those drafts should not be sent to the claimants. On his suggestion and at his wish, and positive wish, I went to see the ass't Secretary of the Treasury. I will say that this occurred in February and in March and in October, the time of the three great appropriations. I went to see the ass't Secretary of the Treasury and placed the matter before him. Before I went I said, "Mr. Baker, can you furnish me with a number of letters from our clients that we have received from

them acknowledgeing the receipt of the money and thanking us for our services?" Mr. Baker did furnish me with quite a number of such letters. With these letters I went over to the ass't Secretary of the Treasury, and I stated to him that we had been for years collecting these claims; that no one had ever found any fault with us; that we had honestly and strictly accounted for every cent; that some of those claims and many of them had had prior allowances, and that if they undertook to send the draft direct to the claimant, instead of through our hands, the question would immediately arise in their minds, "What is the matter with Cummings & Baker? Have they done anything wrong?" The ass't Secretary saw the force of that argument, and he said that it would raise a sort of suspicion, and as a result an arrangement was made by which the drafts came into our hands on the two first occasions—that is, the appropriation of February and the appropriation of March. In the appropriation of October—the ass't Secretary had gone away, as I discovered when I went over to the Treasury, and would not be back until after election. Mr. Baker wanted
165 me to telegraph to him to have the same action taken on the October appropriation as had been taken on the two prior appropriations—that is, that the draft should be delivered to us—and there was an understanding that it should be so delivered, and they were so delivered to us. In one of the letters that passed between Mr. Baker and myself I mentioned the fact that I had rendered him valuable aid, as I believed, in getting possession of these drafts. He acknowledged the fact, and he said that he was willing to make me a fair and reasonable compensation for the amount of work done.

Q. Did your service go so far in that way as for you to name any price for your services?

A. I do not recollect, but I am inclined to think that, following out his admission that I was entitled to a compensation for the services that I had performed, and also the fact that before that one claimant, as it were, got away from him or tried to get away from him and get the draft himself, that Mr. Baker offered me $300 if I would secure that draft and not have it go to the claimant. I think I put a sort of an estimate on the value of those services, but what it is now I cannot say.

Q. What is your best judgment about it as to the price you named?

A. I cannot remember, because it was a percentage, and what that was I cannot say.

Q. Mr. Cummings, didn't these inspector cases grow out of the prior improper construction of sections 2733, 2738 of the Revised Statutes of the United States by the accounting officers of the Treasury Department?

A. They undoubtedly grew out of the neglect or the re-
166 fusal of the Treasury Department to adjust the salaries of inspector- of customs according to the law as laid down in the Revised Statutes, the second section that you referred to. Whether it was the fault of the accounting officer- I don't know, but

I never considered that it was their fault, but rather the direction of the Secretary's office.

Q. Now, after obtaining the powers of attorney from the clients and contracts for your fees, were not the other evidence gotten in this way: entirely from the printed reports of the Treasury Department, which showed the name, the address, and the amount of compensation received by every inspector of customs in the United States; also showing the time when they were appointed and the length of time that they were in service; that, then, being all the evidence in the case, all that was necessary to do was to ascertain, by calculation, the sum due the claimants and present the statement to the department. Didn't that embrace all the evidence touching the inspector cases?

A. No, sir.

Q. What additional evidence did you have to furnish to satisfy the department that the claims were proper?

A. Because there were a great many cases, as those of night watchmen, deputy collector- of customs who were doing the duties of inspectors, and inspectors stationed on the Canadian border, of which there were very many who were paid only during the period of navigation, that it required on Mr. Baker's part a great deal of evidence other than that that could be gotten from the Registers of the Treasury. I know that in case after case I have written
167 for Mr. Baker affidavit after affidavit to be filed in the case by the claimant showing the time of his service and the place of it.

Q. Were there no record evidence in the Treasury Department showing the amount of services, the kind of service, and the names and pay that these persons received that you have just named?

A. That I don't know.

Q. I am speaking of the evidence so far as it is contained in the Treasury Registers.

A. There is nothing in the Treasury Registers to show, as far as I know.

Q. Well, in every case of every claimant filed in the department is not the claim accompanied by an affidavit of the claimant as to the facts of his case—as to what he claims?

A. I think in a great many cases where it was perfectly plain and clear that the letter filed by Mr. Baker, with the power of attorney attached, that would be filed with the first auditor and his clerk would immediately search the record to see when the man was appointed, where he served, see his rate of pay; then a statement would be made and that was sent to the collector of that port. He would make a report upon it, and on the report of the collector of customs and on the records of the department an allowance was made. I will say that some of these cases would have a bundle of papers which would contain all the way from 5, 10, and 15 papers and some of them were long documents, but the principle of the cases was the same all through, and I should say that by far the largest majority of the cases were cases that could be settled

168 on the information that was right in the department, though of that Mr. Baker is more competent to speak than I am.

Q. Before the sale of September 6, 1886, didn't the defendant place in your hands for your examination the books containing all contracts and a list showing in what cases the fees were less than twenty-five per cent. of the amount secured, a list of all the cases allowed and not paid, a list of the pending cases, a list of the suspended cases, a partial list of the cases in which fees were to be divided with other attorneys, and a list of the cases which were not secured by any attorney and which might be secured by the defendant or others and the Treasury Department Registers for 1874, 1875, 1877, 1879, and 1883?

A. He never gave me any such papers as described there. This is the whole of them. He gave me the books containing the contracts, some Treasury Registers, a list of cases that he called "bad cases" or "suspended cases," and a list of cases that he tried to get but had not been successful in getting—that is, getting the powers of attorney—and also a list of cases where the fees were less than twenty-five per cent., and that was all.

Q. That is all he gave you?

A. I never saw a list of cases as pending in the department at the time when the sale was made until Mr. Baker showed them to me this afternoon.

Q. Did not the defendant propose, early in 1886, that the firm settle and close up the partnership, and that each take as his own all or unfinished business taken in since the 1st of January,
169 1885, and divide all fees in business taken in before that date as the fees should be collected, each to retain and manage the business then had in hand, and to this proposition you declined, but proposed to divide the business on the 1st of January, 1886, instead of 1885?

A. Mr. Baker, in January, 1886, began talking about those cases that he had done the most work in, and that he thought that he should have the most fee. He proposed then that he should have all the fees in the cases taken in since the 1st of January, 1885. I, of course, declined any such proposition, but I never knew or heard that he proposed a dissolution of the partnership at that time. After that—I should say some time in August, 1886—he still insisted on some sort of a trade. I did make the proposition to him that I would take one-half of the fees in cases held by us prior to January, 1886, because it was in January, 1886, that he first made any complaint, or that I would give him two-thirds of all the fees in the inspector cases irrespective of when they were taken, or that I would take $15,000.00, as he thought it was the best for me.

Q. Was it not then, at that stage of the proceeding, that the defendant offered to purchase your interest in the inspector cases for $14,000.00?

A. He never offered to pay $14,000.00; he offered me $15,000.

Q. Mr. Cummings, what did you do with the check for $15,000, paid for the purchase of your interest in the said cases and handed to you by the defendant on the 6th of September, 1886?

A. I cancelled the check and put it in Mr. Baker's check
170 book, and upon his saying, when he went away, that there was not probably money enough in Corson & McCortney's to meet it I issued three checks of $5,000 each.

Q. I hand you three checks, dated, respectively, the 7th, 15th, and 29th of September, and ask you in whose handwriting these checks are filled up in, and are they not the checks upon which you received the $15,000.00?

A. (Examining checks:) These are the checks; my own handwriting.

Mr. JOHNSTON: I now offer the checks in evidence and ask that they be marked.

(Filed, marked "Exhibit H. M. B. No. 3.")

Q. I hand you the receipt for the $15,000.00, the purchase-money, dated September 6, 1886, and ask you if this is your signature at the bottom of it.

A. This is the receipt that I gave to Mr. Baker on September 6, 1886; that is my signature.

Mr. JOHNSTON: I offer the same in evidence, to be marked its proper exhibit.

(Filed, marked "Exhibit H. M. B. No. 4.")

Q. Mr. Cummings, can you tell us how it is that with your suspicions aroused the same day or the very next day of the sale of September 6, 1886, that the defendant had overreached you or cheated you, that you didn't file your bill at once and not wait for a period of upwards of three years to elapse before you did bring the suit?

A. Because I had no suspicion that I had been overreached until the summer or fall of 1888, nearly two years after that.

171 EXHIBIT H. M. B. No. 3.

No. —. WASHINGTON, D. C., 9, 7, 1886.

Corson and Macartney, bankers,

Pay to the order of H. S. Cummings five thousand $\frac{1}{100}$ dollars.
$5,000. HENRY M. BAKER.

Endorsed: H. S. Cummings.

No. —. WASHINGTON, D. C., 9, 15, 1886.

Corson and Macartney, bankers,

Pay to the order of H. C. Cummings five thousand $\frac{1}{100}$ dollars.
$5,000. HENRY M. BAKER.

Endorsed: H. S. Cummings.

No. —. WASHINGTON, D. C., 9, 29, 1886.

Corson and Macartney, bankers,

Pay to the order of H. S. Cummings six thousand six hundred eighty $\frac{70}{100}$ dollars.

$6,680.70. HENRY M. BAKER.

Endorsed: H. S. Cummings.

172 Q. You found out enough in the fall of 1888, and not before, to satisfy you that you had been overreached?

A. I did, sir.

Q. How did you ascertain that fact?

A. When I found that $73,000.00, $61,000.00, and $110,000.00 were appropriated to pay the claims of inspectors of customs, and I recognized in the congressional estimates that the very largest part, probably nine tenths, of all the claims were claims that we were the attorneys in.

Q. Learning those facts through that channel and having those facts in your possession, why did you undertake to collect the draft for Mr. Baker for a compensation?

A. I never offered to do it for a compensation and never did do it for a compensation, and I never received any compensation.

Q. That may be, but I understood you to say that you had made an estimate—which you cannot now state—what your services were worth in obtaining these drafts for Mr. Baker by reason of a conference with the Assistant Secretary of the Treasury.

A. I will tell you. When Mr. Baker denied that I had done anything of any consequence in the collection of these claims I pointed to those three instances where I had helped to secure the drafts instead of having them go to the claimants, and Mr. Baker had prior to that presented a claim to me in which he claimed that I owed him $2,700.00, and, taking Mr. Baker, for argument sake, on his own ground, that I claimed that at a very moderate, almost
173 infinitesimal persentage, that my services for collecting those drafts was far more than his claim against me.

Q. Then you proposed to settle it in that way?

A. I did not propose to settle it in that way.

Q. Mr. Cummings, what I want to know is this: Having your feelings aroused to the fact that you had been greatly injured—that you had been cheated by a partner in a business transaction, knowing that fact, yet, without adopting some process to correct that fraud, you nevertheless, at the instance of Mr. Baker and for his especial benefit, applied to the Assistant Secretary of the Treasury and performed certain services in obtaining those drafts for him for which you placed an estimated fee upon it?

A. I placed no estimated fee upon that service at the time it was done. The estimate that I placed on that service was nearly a year after that, and it arose out of a correspondence between Mr. Baker and myself. I had never any idea of charging Mr. Baker anything for my services for the first two lots—that is, the appropriation of February and of March, 1888.

Q. Then, with the full knowledge of the fraud practiced upon you in 1888, you waited a year longer with that information, and probably with additional information, without filing a bill to set aside the conveyance, but in the meantime set an estimated value upon your services for aiding Mr. Baker in obtaining the draft. How do you reconcile that?

A. I never set any value upon my services in the draft matter except as it was drawn out in correspondence between us.

Q. Then you did state a price; am I right?

174 A. I set an estimate as compared to what Mr. Baker said his claim was against me, but there is no estimate set by me in any shape, form, or manner in any way to indicate that I believed at any time that I had any interest in the cases that had been collected since 1886—that is, in fixing a fee for obtaining the drafts.

Q. Can you give a reason why you did not file this bill before the defendant brought his action against you at law?

A. Simply because I was not obliged to; simply because I hoped Mr. Baker would make some settlement; simply because I offered Mr. Baker to leave it to arbitration, and even said he might choose his own arbitrators.

Q. But he thought that there was nothing to arbitrate, didn't he?

A. I can't tell you what his thoughts were.

Q. What did he tell you?

A. He said, "No." I can tell you what he told a friend.

Q. Mr. Cummings, does it not appear to your mind very remarkable that the next day after the sale and you having in your possession all of the facts that you had when you filed your bill, that you should have permitted so long a time to have elapsed without bringing the suit?

A. I had no facts in my possession upon which to file a bill until two years after the sale.

Q. What facts did you have in your possession which warranted your feelings to be so aroused as you had to make a memorandum of it the same day of the sale or the next day?

A. The mere fact that Mr. Baker had undertaken to claim that I had practically no rights in the inspector cases; that I had done

175 nothing in the inspector cases; that they were his own work and he should have all the compensation.

Q. But you knew that fact before you signed the receipt of September 6, 1886. If it existed then, why did you sign the paper?

A. As I have said, simply because of his importunities, and I was willing to make the sale on the representation and estimate that he had given me.

Q. Mr. Cummings, had you any facts in relation to the appropriation of 1886 in 1888 which you did not have in 1886? If so, state what.

A. I do not see what the question means.

Q. Did you have in 1886, relative to the appropriation of 1886, facts, and carried them along with you until 1888, and there gathered facts that you did not have in 1886 touching that appropriation of 1886?

A. In 1886 I knew of the fact of the appropriation; I knew the fact that the largest part of the appropriation came to Cummings & Baker as attorneys in 1888; I knew there were three appropriations made, and by assisting Mr. Baker in making out the powers of attorney to collect, and helping him write the letters and having them copied to put them in envelopes, and also collecting parts of the money when he was gone, I became aware of the fact that we still collected the largest part of the appropriation in 1888.

Q. My question, Mr. Cummings, does not refer to the appropriation of 1888, and I again take you back to the appropriation of 1886 and beg that you will answer that question. Do you understand the question?

176 A. I knew no more about the standing of the appropriations of 1886 for these cases and of the settlements thereunder for two years after those settlements were made; in other words, I had no knowledge of the appropriation of 1886 until my suspicions were aroused in 1888. I supposed it was all fair and square.

Q. Now, Mr. Cummings, tell us, if you please, what you learned in 1888 touching the appropriation of 1886 that you did not know in 1886.

A. I don't know that I learned anything in 1888 of consequence about the appropriation of 1886, but it was only when the three appropriations, amounting to about $240,000.00, in 1888, instead of the $80,000.00, as was represented to me, that I began to inquire into the matter, and my knowledge of the appropriation of 1886 and of the fees thereunder was gained by taking the appropriation of 1886 and going into the first auditor's office and seeing what drafts were delivered to Mr. Baker or Cummings, or Cummings & Baker, under the appropriation of 1886. When I had gotten the list of those drafts I got the correct amount of them.

Q. When did you get the list of those drafts?

A. I think it was in the fall or winter of 1888 or 1889. I did not get a list; I made a list, and I went back to my office and I took the Treasury executive document containing the allowances of those cases and I estimated as far as I could, and I believe that I am correct that Mr. Baker received $135,000.00 on the claims of 1886.

Q. Mr. Cummings, will you be good enough to say that you knew nothing whatever about the appropriation of 1886

177 until 1888?

A. I don't remember now that I knew anything intervening between 1886 and 1888, though I may have done so, but I do not remember it.

Q. Now, you have testified in substance that: We were successful in the prosecution of these cases until about 1883, when Congress refused to make an appropriation, but instead made a contingent appropriation providing that at least two cases should be sent to the Court of Claims, and that the Court of Claims should pass thereon, and that if the Court of Claims passed favorably upon the claims, then the balance of the claims were to be paid, and they went there and were argued and decided in our favor. How did

you learn the facts of which you have there testified, and when did you learn them?

A. I learned the fact from being the partner of a man who tried the cases and was interested to the extent to have a half interest in the cases.

Q. Did you take any part in the presentation or argument of the cases before the Court of Claims?

A. I did not.

Q. You say that there are a great many thousand dollars of these claims not collected.

A. That is my opinion.

Q. Can you give the name of a half a dozen of them?

A. I can't, because I have no means of knowing.

Q. It is a mere supposition or surmise?

A. It is a supposition on my part.

Q. You stated that it is deposited in Corson & McCartney's on account of these claims $128,000.00. Tell us how you know that fact.

178 A. The time that I was depositing there, when Mr. Baker went away, in 1886, after he had given me his check for $15,000.00. I went on collecting, but I had the curiosity, either just before or just after Mr. Baker came back, to see how much had been deposited there, but the figure that I stated as $128,000 is my remembrance of it, not that I know it.

Q. Did you derive the information from McCortney or Carson?

A. I derived it from the bank.

Q. In whose name was the account kept?

A. The account was kept in the name of Henry M. Baker. We never had a joint account all the time that we were in business, but I will say this, that for years we paid these drafts through H. D. Cook & Co., and that before the account was kept in my name in Carson & McCartney's, and in 1886 the account was kept in Mr. Baker's name.

Q. Did you ever deposit any of that money, of the $128,000, after 1886 in Carson & McCartney's bank?

A. Oh, yes; because when Mr. Baker would be away—in 1888 he would be away a week or ten days at a time—and if any powers of attorney came in to indorse the draft I would take the power of attorney to the Treasury and have it certified and get the draft and have it stamped, and I would take the draft to Carson & McCartney's and deposit it.

Q. So you did deposit after 1886 moneys to the account of the defendant in Carson & McCortney's bank?

A. I did, as I recollect.

Q. In your examination-in-chief you say that when the claims were allowed you helped the defendant, aided him as much as usual—in fact, you gave as much aid or, perhaps, more, in

179 collecting this lot of cases in January or February, 1888, as you ever had in collecting the other claims. Will you state specifically what you did and whether you did this at the request or Mr. Baker or not?

A. I certainly did do it at the request of Mr. Baker. To be a little more explicit, when the appropriation bill was passed and became a law Mr. Baker would prepare a list of the allowances and he would write a letter, and then we would have a large number of copies of those letters made. I would fill out the power of attorney and enclose it, and did all the clerical work, because there was nothing else to do. I did it just as much after 1886 as I did before.

Q. Mr. Cummings, what did Mr. Baker do in connection with all of those cases?

A. Just the same as he always did. You must remember that we worked just as hard as we could upon those cases, because — was a matter of necessity or a matter of choice, at least, to get all these powers of attorney just as soon as we could.

Q. Will you please state the name of the cases in which you employed Mr. Lewis Abraham, of whom you have heretofore spoken, in connection with the claim of David Heustis? What fee does your present contract with Mrs. Heustis provide for in that case?

A. The original fee was 30 per cent. or 33 per cent.; I will not be sure which. The case became complicated and Mr. Abraham, who was a patent lawyer and rather an expert in that line, thought he could do good work in it and wanted to come in, and I
180 consulted Mr. Baker about it and he agreed with me, and he consulted Mr. Abraham, too. I wrote to the administratrix of the estate and I got a new power of attorney at 50 per cent., and I agreed with Mr. Abraham that the fee should be kept in three pieces. He took charge of carrying the case through and doing all the work and attending to it and to have one-third of the fee. I did that on the basis of getting a new contract.

Q. What fee did you promise Mr. Baker?

A. One-third.

Q. One-third of what?

A. Of the new fee.

Q. Of the fifty per cent.?

A. I suppose so.

Q. Mr. Cummings, are you now prepared to present the schedule of claims in your hands, filed during your partnership with the defendant, as called for in the first session of your cross-examination?

A. I have it at the office; I will file it next time.

An adjournment was here taken until Wednesday, June 8, 1892, at 3 o'clock p. m.

WEDNESDAY, *June* 8, 1892, at 3 o'clock p. m.

Met pursuant to adjournment.

Present: Counsel for the respective parties.

Whereupon HORACE S. CUMMINGS, being recalled, was further interrogated.

By Mr. JOHNSTON:

181 Q. Mr. Cummings, have you produced the list that we called for last session?

A. I have not. I have prepared a list of cases, but the list requested requires so much labor, wanting to know the situation, the condition, and the circumstances in each case, that I have not had time to prepare it, but I will furnish it during the examination with the understanding that I will be questioned in regard to any of them.

Q. State, if you please, when the copartnership between you and the defendant was dissolved?

A. I am unable to state.

Q. I would like to have the date if I can.

A. I cannot state the date.

Q. Have you any memorandum in your possession by which you could state the date of the dissolution of the copartnership?

A. I have no memorandum except the letters that passed between Mr. Baker and myself. Mr. Baker, I presume, has those letters, but I kept no copy.

Q. But you know the fact that it has been dissolved?

A. I do.

Q. You have stated that you were a-mitted to practice before the Court of Claims; will you be kind enough to state upon whose motion you were admitted?

A. I was admitted by no man's motion. I had some cases that I filed in the Court of Claims. It was during vacation I filed cases. I can't say as to who was present, whether it was Mr. Hopkins or Mr. Randall. I wanted to make a call on the department at once.

182 He told me to go to Judge Drake's house; he was then in the city, sitting in chambers. I went to his house on G street and told him the facts, and he said, "Well, I will grant your request," and a call was made, and I said to him, "I have not been admitted," and he said, "This will do as well." I have been acting upon that admission ever since and I have always been recognized.

Q. Will you tell us, if you please, the date of the assignment of Henry D. Cook & Co. to you as assignee?

A. I will not be sure, but I think it was about the 23rd day of October, 1884; that is my remembrance at this time; either the 23rd of September or the 24th of October, but I am inclined to think the 23rd of October.

Q. Now, you have testified relative to a debt that Mr. Hellen owed you by reason of a loan you made at the instance of Mr. Baker. Have you the Hellen note to which you referred in your testimony?

A. I have not.

Q. Do you know anything about where it is?

A. I think it is in the hands of the attorney to whom I delivered it.

Q. And that is the note for which Mr. Baker paid you one-half, with interest?

A. He did.

Q. You referred to a case in your testimony-in-chief that you call the "coal case" and the "St. Charles" and "Anglo-American"

cases. Please state when each of those cases were paid and in whose name each was paid by the Treasury Department.

A. In regard to the names "Anglo-American" and "St. Charles" I wish to make a correction. It was the case of the steamer Baltic instead of the Anglo-American and St. Charles. The draft
183 was to the order of S. and J. M. Flanagan, of Philadelphia; the draft in the coal case was to the order of Joshua Rhodes and Bagley, assignees in bankruptcy of the estate of Cosgrove and McClosky.

Q. State when they were paid, if you recollect.

A. I think they were paid in the month of April, 1877. I will say in regard to both of those cases that both had been prepared by me as far as they could be prepared. In the coal case I presented the papers, but I lacked one important paper which I had reason to believe was in existence. Mr. Browning, who was at one time Secretary of the Interior, had been the attorney in this case. He retired from business and the case finally came into the hands of Charles Ewing as successor of the firm of Browning & Ewing. Knowing that they were the attorneys in the case, I thought probably they might have some old papers relating to the case. I went down to Mr. Ewing's office and made a search, and I found the papers there that I wanted. I went out to Pittsburgh and saw Mr. Rhodes and got from him an order upon Mr. Ewing to deliver to me or my order the papers in the coal case. I sent them to Mr. Baker with request that he go at once to Mr. Ewing's office and get these papers, as I knew that Mr. Baker was well acquainted with Mr. Ewing's clerk, who had charge of his business when he was absent, and Mr. Baker did go, and he obtained those papers, which were valuable in the gaining of the coal case. In regard to the Baltic case, I had practically won that case a long time before, but I was met with an objection of a question of title; so I had to delay the final settlement of the case and have a suit brought in the city of New Or-
184 leans to set the old title aside and to have a new title to the possession. That was done, and when I presented the evidence of that new title, with the decision of the court properly certified, the case was allowed.

Q. Mr. Cummings, referring again to the service you rendered Mr. Baker in obtaining the drafts of the Treasury Department in the inspector cases for him, do you recollect of making a claim for your services in obtaining those drafts for the sum of $3,000.00?

A. I never made any such claim, and I wish to state, in explanation of my answer, that Mr. Baker had presented a claim to me for $2,700.00 and I, in reply, referred to these services in obtaining the drafts, and my conclusion was that I did not owe him anything of the $2,700.00, because, making allowance even for obtaining these drafts, I am entitled to more than $2,700.00; but I made no claim for it.

Q. Do you recollect the amount of the drafts that you got through for him?

A. The favorable action that I asked for and which was granted

by the Treasury Department covered drafts amounting, I should say, to about $240,000.00. I may be mistaken in the amount, because I don't know the amount of drafts that Mr. Baker received, but it covered whatever drafts there were in the three appropriations of 1888.

Q. You knew at that time the amount, didn't you?

A. I did not, and I do not know now.

Q. What did you ask the Secretary to do, then? How did you bring the matter before him?

A. I explained that more fully in my testimony of last Monday.

185 Q. Did you inform the Secretary as to the amount of the drafts that were to go through and the number of drafts that were to be paid?

A. I did not, because I did not know. I showed him the schedules as shown in the executive documents and told him that we controlled a large number of those cases, and I did not know how many drafts that Mr. Baker received.

Q. But what the amount of the drafts aggregated you knew, did you not, from papers you had in your hands then?

A. No, sir; I had nothing in my hands showing the amount of drafts in which Mr. Baker was interested. I had in my hands the documents showing the amounts of drafts covered by these appropriations, but how many Mr. Baker had I do not know.

Q. You did not care, either, did you?

A. I did not care.

Q. I believe you gave the date when you applied to the Secretary in the matter of the drafts, did you?

A. No; I did not, because I could not give it.

Q. Can you state the year or the month when you applied to the Secretary to have those drafts delivered to Mr. Baker?

A. I should say it was in March, in the first appropriation—March, 1888. In the second appropriation it was in April, and in the third appropriation it was the latter part of October of 1888.

Q. Mr. Cummings, do you know the fact that the drafts were delivered to Mr. Baker?

A. I do.

Q. How were they delivered to Mr. Baker?

186 A. By Mr. Baker's presenting his power of attorney to the Treasury and taking the power of attorney and the draft thus delivered to him and presenting it to the First Comptroller, having the draft and the power of attorney compared and examined, and, if found correct, the order of payment to Mr. Baker is stamped upon the back of the draft.

Q. Well, after the drafts had been delivered to Mr. Baker and were honored by the Treasury Department, did you have any further talk with Mr. Baker upon the subject of those drafts?

A. Only as he would come into the office, and if he was pressed for time and was in a hurry to get them off that afternoon he would endorse the drafts and he would take them into Corson & Mc-

Cartney's, as I supposed. He would deposit them there and then receive a draft from them for the amount of allowance minus his fee, and that draft he would bring back and enclose it in a letter to the claimant and with a request for the acknowledgement of the same.

Q. Mr. Cummings, in your settlement of your personal matters with Mr. Baker, did he not offer to allow you anything for your services rendered in assisting him in getting these drafts delivered to him?

A. Not at that time, but in correspondence afterwards, when, in speaking of what aid I had given in these cases, Mr. Baker did acknowledge these services, and he said that he was ready to make ample compensation for them, but he never named any sum.

Q. Did he say that he thought the sum of $500 would be ample compensation for the services rendered?

187 A. He might have done so; I do not know whether he did or not, but I think likely that he did.

At this point an adjournment was taken until Saturday, June 11th, at 3 o'clock p. m.

188 MONDAY, *June* 20, 1892, at 3 o'clock p. m.

Met pursuant to adjournment.

Present: Counsel for the respective parties.

Thereupon HORACE S. CUMMINGS, being recalled for further cross-examination, was examined and testified as follows:

By Mr. JOHNSTON:

Q. Mr. Cummings, have you found that list?

A. I have made a list.

(The witness, in answer to the call of the counsel for the defendant, produces the list of cases pending at the time of the dissolution of the partnership.)

Filed, marked "Exhibit H. M. B. No. 5."

Q. Mr. Cummings, will you be kind enough to state when your partnership began with the defendant?

A. I should say, in September, 1874. I will not be sure.

Q. Will you also state when it was dissolved?

A. I should say August, 1889, though I will not be sure.

The WITNESS: I wish to make a statement in regard to the paper introduced by the defendant, and to which we objected as having no material bearing upon the case and tending to divert the attention of the court from the real matter at issue, in this: I refer to the name of Mr. Mahon, who was the 1st auditor of the Treasury, and Colonel Reynolds, who was his successor. I never knew

189 Mr. Mahon personally in my life. All that I knew of him up to that time was what Mr. Baker had told me. I knew that he and Mr. Baker were at odds; of the merits I do not know; that it resulted in non-action in these cases, and Mr. Baker was very

anxious that there should be another auditor. I never knew Col. Reynolds until Mr. Baker introduced me to him as an old friend of his in our office, and after I had known him a short time Mr. Baker suggested that he would be a good man for auditor. Mr. Reynolds wanted an office, supposedly, because he became a candidate for the office of 1st auditor and the administration were inclined to appoint him, Mr. Reynolds being of the same politics as the administration. Mr. Mahon, who was always considered an honest and efficient officer, of course had his friends to protect him, and they brought out the ground that Mr. Mahon should not be displaced because he needed the salary to live upon, and I was asked by a prominent officer of the Government if that was true. I told him I did not know. He wished me to find out. I did make an inquiry of persons whom I believed knew Mr. Mahon's circumstances, and I demonstrated to the gentleman wishing me to make the inquiry the fact that Mr. Mahon was independent in circumstances and was able to live without it, and upon that proof being made Mr. Reynolds was appointed as Mr. Mahon's successor. That is the meaning of my reference in the said paper.

In regard to Col. Reynolds, Mr. Baker and Mr. Reynolds did not get along well together in regard to these cases. Mr. Baker thought that Col. Reynolds did not push them up or was not as liberal or was not as active in the allowance of those cases
190 as he should be, and one day I was told by a person in the department that Mr. Reynolds and Mr. Baker had had a falling out, and I asked him what it was about, and he said that Baker had been in and seen the auditor and given him a pretty rough talking to and Mr. Reynolds felt very bad about it. I met Col. Reynolds a day or two after that and Mr. Reynolds seemed distant, cold. Knowing that I had been on warm terms of friendship before, I could not understand it. I went and talked with Col. Reynolds in the office and he was considerably excited. He said that Mr. Baker had not treated him fair and had not talked to him as a person practicing before the department should, and he said, "I am very much inclined to report it to Secretary Folger," and I said, "Don't do it. I am interested in these cases and I don't want to be slaughtered because of another man's ill-judged action," and I gave him an invitation to my house to dinner and told him that I wanted to have a talk over this thing. He came up there and we went into the back parlor and we talked the matter over. I told him I thoroughly believed in these cases and I knew they were right, and the more they were investigated the more he would believe in them, and it was not right that he should allow these cases to suffer on account of his feelings towards any man, and the result was that he never made any report of the matter to the Secretary and he was on seemingly good terms. He was on very good terms with me. That is the explanation in regard to the reference to Col. Reynolds.

Mr. JOHNSTON: This voluntary statement of the witness is objected to, because it is immaterial, irrelevant, inadmissible, and

191 hearsay and not drawn out by any question that I have asked him in this session or at the preceding sessions.

HORACE S. CUMMINGS.

Subscribed and sworn to before me this 7th day of January, A. D 1893.

J. ARTHUR LYNHAM, *Examiner.*

The complainant here rests his case.

[Endorsed:] Cummings *v.* Baker.

192 I certify that the foregoing deposition, comprising 99 typewritten pages, *were* taken down by me in shorthand, as an examiner in chancery, from the statement- when and as uttered by the deponent thereof; that the same was thereafter transcribed and reduced by me into print and thereupon read and subscribed by the deponent in my presence.

I further certify that my fee of $75 for taking, certifying, and returning said deposition has been paid to me by the complainant.

And I further certify that I am not of counsel nor in anywise interested in this case.

J. ARTHUR LYNHAM,
Examiner in Chancery.

193 EXHIBIT H. S. C. No. 1. Filed May 15, 1893.

Office of the Register of the Treasury.
Form 47.

Customs.

B.

TREASURY DEPARTMENT.

To the Treasurer of the United States, Greeting:

Settlement warrant. D. Pay to parties named on back of warrant, care com'r of customs, or order, to be charged to the appropriations named in the margin, thirty-three thousand one hundred fourteen dollars and ninety-five cents. Due ——, —— ——, collector &c., is to be charged, as per certificate of the commissioner of customs No. 95532, dated the 14th day of Aug., 1886. Recorded by the Register.

No. 573. D.
W.

$33,114.95.

J. B. C. For so doing this shall be your warrant.

Appropriations.

Prior to July 1, 1883.	Collecting revenue from customs.....	33,114 95
	Revenue-cutter service..	
	Marine hospital service...	
	Establishing life-saving stations.....	
	Life-saving service.....	
	Repayment to importers...	
	Excess of deposits.....	
	Salaries, shipping service.	
	Services to American vessels (customs).....	

Treasurer's Office,
Aug. 21, 1886.
Division of accounts.
C. M.

Given under my hand and the seal of the Treasury Department this 20 day of August, in the year of our Lord one thousand eight hundred and eighty-six, and of Independence the one hundred and eleventh.

[SEAL.]

W. F. McL. THOMPSON,
Assistant Secretary.

A. W.

Countersigned: 21.
M. J. DURHAM,
First Comptroller,
By J. R. GARRISON,
Deputy First Comptroller.

Registered:
21. ROS. A. FISH,
Act'g Register.

23.

OFFICE OF THE TREASURER OF THE UNITED STATES.

Received for this warrant the following p. draft-:
No. —. All on New York.
No. —. on
No. —. on 8–27.
H. A. LOCKWOOD,
D'y Com.

Endorsed:

Customs warrant No. 573.

Pay to 5081 Virgil A. Crawford $1,521.38.

194 Draft on customs. Warrant No. 573, p't.

No. 5081. TREASURY OF THE UNITED STATES,
Pr. C. M. WASHINGTON, D. C., *August* 23, 1886.

Pay to the order of Virgil A. Crawford fifteen hundred twenty-one $\frac{38}{100}$ dollars.
$1,521.38.

J. W. WHELPLEY,
Ass't Treasurer of the United States.

{Paid Sep. 2, 1886, New York.}

To the ass't treasurer U. S., New York, N. Y.
Register's office, form No. 234. Ed. 4, 24, '91—500.

Endorsed:

Payable to authority on file.

HENRY M. BAKER, *Attorney.*
J. R. GARRISON,
Dep'y First Comptroller.
HENRY M. BAKER, *Att'y.*

Pay to the order of Moore & Schley for account of Corson & Macartney, Washington, D. C.

CORSON & MACARTNEY.

For deposit in Fourth Nat'l bank for account of Moore & Schley.

MOORE & SCHLEY.
C. H. PATTERSON.
A. C. C.

195

EXHIBIT H. S. C. No. 2.

Filed May 15, 1893.

Henry M. Baker, attorney and counsellor at law, No. 1411 F street N. W.

WASHINGTON, D. C., *January 4th*, 1886.

Hon. J. Q. Chenowith, first auditor.

SIR: I have the honor in behalf of D. K. Zoltman, whose power of attorney to me is on file in the department, to make application for the arrears of salary due him under secs. 2733 and 2738 of the Revised Statutes for his services as an inspector of customs in the district of Vermont from August 1, 1875, to the end of his service.

I am, very respectfully, your obedient servant,

HENRY M. BAKER, *Att'y.*

This claim was allowed by commissioner of customs on the 13th day of February, 1888.

Certified also on Oct. 1.

Endorsed: 96703. Vermont. V. T. D. K. Zoltman. $162.00.

Date of allowance.	Name of claimant.	Date of letters.	Amount endorsed.
196			
Feb. 13, 1888	D. K. Zottman	Jan. 4, 1886	162 00
" " "	W. H. Rand.....	Aug. 28, 1885	1,233 00
" " "	G. D. Sowles	Oct. 3, 1885	549 66
" " "	N. H. Brown.....	Sept. 7, 1885	3,252 56
" " "	S. H. Wood	Aug. 31, 1885	165 00
" " "	S. Story.....	Nov. 18, 1885	420 00
" " "	L. L. Penniman	Aug. 28, 1885	501 00
" " "	Calice Limoge.....	Dec. 21, 1885	1,569 37
" " "	H. H. Rounds.....	Nov. 28, 1885	969 00
" " "	H. H. Dean.....	Jan. 5, 1886	2,328 83
" " "	C. O. Churchill.....	June 9, 1886	1,522 94
" " "	A. A. Reed.....	Jan. 4, 1886	120 00

Date of allowance.	Name of claimant.	Date of letters.	Amount endorsed.
Feb. 13, 1888	J. L. Schuyler	Mar. 29, 1883	652 25
" " "	J. W. Glennie.....	Nov. 2, 1882	421 78
" " "	Ezra Hazen.....	—— —, 1885	2,191 50
" " "	H. E. Bedell.....	Sept. 16, 1885	547 84
" " "	H. T. Benedict	Nov. 21, 1885	202 50
" " "	Chas. Wells.....	Aug. 28, 1885	84 00
" " "	Geo. F. West.....	Nov. 28, 1885	186 00
" " "	J. H. Brocks.....	Nov. 18, 1885	649 07
" " "	Jno. F. Bain.....	Aug. 28, 1885	106 07
" " "	Cassius M. Booth...	Nov. 19, 1885	417 00
" " "	J. S. Spaulding	Oct. 5, 1885	609 00
" " "	C. E. La Duke.....	Dec. 18, 1885	477 00
" " "	Amanda F. Palmer.	Sept. 28, 1885	191 00
" " "	Geo. W. Brush.....	Dec. 10, 1885	202 50
" " "	C. D. Staples.....	Aug. 28, 1885	183 00
197			
Feb. 13, 1888	G. L. Ewins.....	Dec. 12, 1885	2,562 34
" " "	F. M. Holden.....	Feb. 17, 1885	800 25
" " "	Richard O'Neil.....	Jan. 4, 1886	57 00
Dec. 11, 1886	W. H. Tefft.....	Mar. 11, 1885	1,355 50
" " "	P. H. Raiford.....	Sept. 16, 1885	439 20
" " "	W. H. Coe.....	April 13, 1885	462 82
" " "	W. E. Keeler.....	March 11, 1885	2,108 45
" " "	Andrew Green.....	Feb. 17, 1885	239 25
" " "	Thomas H. Starr ...	March 29, 1886	648 90
" " "	Matthew Hooper....	June 11, 1883	621 30
" " "	Jno. A. McKay.....	Oct. 12, 1882	609 24
" " "	F. E. Whitesell.....	Feb. 17, 1885	1,427 50
" " "	Catherine Sweeny...	Oct. 12, 1882	2,099 00
" 21, "	F. H. Koch	Mar. 29, 1883	343 33
" " "	Otis Little	Oct. 9, 1882	762 75
" " "	James Paine, Jr.....	Mar. 29, 1883	2,079 52
" " "	Chas. H. Cay.....	April 14, 1885	1,082 05
Feb. 13, 1888	D. J. Follett.....	Sept. 5, 1885	933 33
" " "	W. H. Gibbs.....	Mar. 11, 1885	1,295 32
" " "	A. B. Holmes.....	Feb. 17, 1885	509 96
" " "	Chas. S. Bunker....	June 12, 1883	990 32
" " "	N. S. Smith.....	Feb. 17, 1885	4,125 70
" " "	J. T. W. Curtis.....	—— —, 1885	886 00
" 14, "	Josiah R. Brooks....	Feb. 17, 1885	369 60
" " "	Peter C. Bird.....	Feb. 17, 1885	660 10
" " "	M. A. Powers.....	Mar. 19, 1885	843 10
" " "	O. W. Robinson....	Feb. 17, 1885	122 00
" " "	Will. H. Salis.....	April 18, 1885	86 70

Date of allowance.	Name of claimant.	Date of letters.	Amount endorsed.
198			
Feb. 14, 1888	Albert Ellsworth....	Sept. 21, 1880	382 84
" " "	J. R. Bradford.....	Mar. 29, 1883	290 70
" " "	William Lowen.....	Feb. 17, 1885	4,316 68
" " "	E. S. Harris.....	Feb. 17, 1885	3,738 82
" " "	B. P. Adams.....	April 20, 1885	72 82
" " "	W. R. Durfee... ...	May 26, 1885	1,867 87
" " "	C. M. Bentley.....	Feb. 17, 1885	479 35
" " "	James S. Moffatt	May 26, 1885	1,453 10
" " "	A. C. Hayward	Feb. 17, 1885	2,082 61
Ap'l 10, "	J. W. Haynes	Jan. 5, 1886	207 00
" " "	Geo. W. Davis.....	Jan. 18, 1886	1,723 41
" " "	Robert Hancock	Sept. 10, 1885	333 04
" " "	S. E. Blood	Dec. 24, 1885	1,723 41
" 7, "	J. M. Johnson	Feb. 26, 1886	1,094 04
" " "	J. H. Hamlin.....	Mar. 29, 1883	532 04
" " "	L. Van Boskerch....	Mar. 11, 1885	1,335 00
" " "	J. P. Thomas.....	May 26, 1885	1,324 50
" " "	B. F. Kelley.....	Feb. 10, 1886	192 00
" " "	H. H. Adams.....	Jan. 18, 1886	531 00
" 9, "	D. K. Huntington ..	Feb. 17, 1885	1,904 03
" " "	Chas. B. Tyler... ..	Mar. 11, 1885	2,623 50
" " "	Geo. S. Haskins.....	Feb. 17, 1885	3,902 92
" " "	Geo. J. Kerbs.....	Feb. 17, 1885	940 32
" " "	H. M. Clemons.....	Feb. 17, 1885	3,490 57
" " "	J. W. Sylvester.....	Feb. 17, 1885	3,625 07
" " "	William Baird.....	Feb. 17, 1885	3,097 39
" " "	B. W. Jenks.....	Feb. 17, 1885	2,501 50
" " "	Alexander Ferguson	Nov. 2, 1882	2,382 51
199			
Apr. 9, 1888	Geo. H. Gregory....	Feb. 17, 1885	2,525 50
" " "	Jno. W. Glennie....	Feb. 17, 1885	2,030 33
" " "	C. S. Nims	Nov. 2, 1882	3,238 34
" " "	Geo. S. Lester.....	Nov. 11, 1885	990 33
" " "	C. A. Blood	Feb. 17, 1885	2,110 90
" " "	B. C. Hurd.....	Oct. —, ——	246 00
" " "	F. C. Blood.....	Oct. 17, 1885	1,244 37
" " "	J. J. Potter.....	Feb. 17, 1885	1,636 50
" " "	Nathaniel Robinson.	Nov. 11, 1885	1,095 85
Oct. 23, 1888	James A. Crozer ...	May 26, 1885	286 20
" " "	Geo. M. Sackrider...	Mar. 16, 1885	582 49
" " "	Chas. E. Aiken.....	May 26, 1885	994 94
" " "	Frank D. Clark.....	Mar. 20, 1885	916 48
" " "	J. Fleisheim.....	Sept. 11, 1885	367 94

Date of allowance.	Name of claimant.	Date of letters.	Amount endorsed.
Oct. 23, 1888	R. H. Brelsford.....	Mar. 11, 1885	1,719 64
" " "	J. Q. Barnand.....	Feb. 17, 1885	2,259 21
" " "	S. W. Hall.....	Oct. 10, 1882	1,443 74
" " "	Joseph Taber.....	Nov. 10, 1882	2,608 58
" " "	J. H. Holmes.....	Oct. 10, 1882	2,126 20
April 11, "	Hiram Brown.....	Feb. 17, 1885	2,479 64
Oct. 23, "	Geo. F. Sisson.....	Oct. 10, 1882	3,329 02
" " "	Levi B. Downs	Oct. 11, 1882	497 90
" 25, "	H. W. Bertle.....	May 5, 1885	1,554 05
" " "	John D. Thompson..	Oct. 5, 1882	312 96
" " "	John S. Drew	Oct. 10, 1882	4,456 89
" " "	E. J. De Medicis....	Jan. 5, 1886	2,605 73
" " "	W. J. Alden.....	Oct. 10, 1882	4,148 52
" " "	G. E. Scofield.....	Feb. 23, 1885	4,071 47
200			
Oct. 25, 1888	Stephen Holmes....	Oct. 10, 1882	1,289 13
" " "	Gould D. Jennings..	Aug. 19, 1886	5,663 68
" " "	John X. Miller.....	Oct. 11, 1882	1,567 50
" " "	B. F. Miller.....	Oct. 11, 1882	1,147 50
" " "	C. S. Peale.....	Oct. 12, 1882	2,392 50
" " "	C. B. McLellan.....	Sept. 24, 1885	450 27
" " "	W. H. Atkins.....	Sept. 16, 1885	1,881 14
" " "	J. Barthalow.....	Oct. 7, 1885	400 70
" " "	H. A. Ashmore.....	Feb. 17, 1885	122 00
" 30, "	David S. Beetle.....	Dec. 1, 1879	3,696 53
" " "	S. H. Calligan.....	Oct. 9, 1882	4,461 00
" " "	Thomas Hurst	Oct. 5, 1882	2,127 00
" " "	Edward Ashman ...	Sept. —, 1885	1,220 00
" " "	Lucius Gilbert.....	Oct. 12, 1882	5,854 73
" " "	Thomas Coe.....	Oct. 12, 1882	549 00
" " "	Grant Smith	Oct. 12, 1882	5,720 89
" " "	S. P. Bartlett.....	Mar. 29, 1883	951 26
" " "	A. P. Tilton.....	Mar. 27, 1885	912 13
" " "	Benj. Predmore.....	Oct. 11, 1882	1,015 32
" " "	S. C. Johnson.....	.....	3,547 05
March 12, 1889	J. T. W. Custis	Feb. 17, 1885	3,252 25
" " "	Lorenzo Ricord.....	Sept. 28, 1885	1,411 76
" " "	Peter Lander.....	Aug. 7, 1885	711 00
" " "	Allen S. Fleury.....	Oct. 1, 1885	1,002 55
April 11, 1888	Geo. T. Arnold.....	Mar. 25, 1885	2,585 45
" " "	Charles Delamere...	May 5, 1885	1,498 67
" " "	E. H. Green.....	Mar. 16, 1885	2,561 70
" " "	A. J. Kidd.....	Mar. 11, 1865	2,256 30
" " "	L. H. Hartwick.....	Feb. 17, 1865	783 38

Date of allowance.	Name of claimant.	Date of letter.	Amount endorsed.
201			
April 11, 1888	Will. H. Tuller.....	Mar. 12, 1885	2,301 09
" " "	G. W. McBride	Dec. 3, 1885	1,079 23
" " "	A. J. Butler	Feb. 17, 1885	3,250 15
" " "	C. W. Appleby	Feb. 17, 1885	1,398 12
" " "	M. Z. Lampman....	Feb. 17, 1885	2,810 76
" " "	E. W. Fisk.....	Apr. 13, 1885	1,919 43
" " "	J. P. Reig.....	Mar. 11, 1885	1,912 47
" " "	M. L. Rice.....	Jan. 23, 1886	645 69

202 EXHIBIT H. M. B. No. 1.

Filed May 15, 1893.

Personal.

SIR: In reply to your inquiry I make you the following statement as to the standing of the affairs of the late firm of H. D. Cooke & Co.:

When the said firm failed, on October 23, 1884, their books showed their standing towards the general creditors to be as follows:

Secured debts (debts to banks and individuals secured by collateral).....	$68,070 00
Preferred debts (certain creditors legally preferred by the deed of assignment).....	29,592 57
General debts (having no preference or security).....	123,876 88
Total.....	$221,539 45

The above shows that the amount of indebtedness to be provided for was then $153,469.45, that being the amount above the secured debts.

An examination of the books showed that the assest were composed of overdrawn book accounts, overdue notes and certificates, and other evidences of various investments in various companies, &c., which have proven to be of but little value and can be utilized by skil-ful management. These and an uncertain interest in a scheme known as the Florida Coast Line Canal and Transportation Co., which stood on the books as costing $37,881.61, constituted the assets.

203 Mr. Campell, a partner who lived in the West and in no way blamable for the management and losses of the firm, at

once directed me to use an investment that he had made from his own private funds and not an asset of the firm in the purchase of the Washington, Ohio & Western railroad in Virginia, in paying of the debts of H. D. Cooke & Co. for which he might be liable.

My duty under the assignment was to dispose of the assets as soon as practicable, but an immediate disposition of them would have been ruinous and would have yielded but a very small percentage of the amount due the creditors.

The canal scheme would have been practically suspended when the firm failed if the pay-rolls of that Co. had been allowed to remain unpaid and active work been stopped, and that asset would have been lost. In this state of affairs I assumed the responsibility and personal liability of advancing the security for the payment of the expenses of the work on the canal from Oct., 1884, to April, 1885, till a new arrangement could be made, and save this asset from a total loss and the charter from forfeiture. The result proved that I was right in taking this liability of more than $18,000 upon myself, for today this asset is worth more than ever, I having $45,000 of their 1st-mortgage bonds and $84,000 of stock in my hands as assignee, an interest greater than before held by the firm. The securities advanced by me have been returned, so that the creditors of H. D. Cooke & Co. reap the benefit of the liability I assumed wit-out loss or expense to themselves.

When the W., O. & W. R. R. was purchased from the com-
204 missioners appointed by the court in Virginia by the syndicate, of which Mr. Cooke was one, acting for the interest of Mr. Campbell, for the sum of nearly $5,000,000, the same was payable in instalments, and the last instalment was not due till the 1st of Feb'y, 1885, some three months after the failure. Notice was duly served upon me that unless this payment was made on or before the said first day of February that they would enter *unto* possession of the road and leave the purchasers to their remedy in the courts to determine what rights they had, if any, after their neglect to pay as agreed.

This meant, in my opinion, a total loss of the $59,500 already invested by Mr. Campbell, and it became my duty to save this interest for the creditors.

I was obliged to raise the sum of $45,000 in order to meet the demands of the courts in Virginia. The railroad allowed me the use of their notes and a portion of their securities, and after much trouble a loan of $35,000 was secured from Wells, Fargo & Co. and $10,000 from the Franklin Bank of Baltimore on the notes of the railroad Co., pledging the entire interest at stake as collateral to the loan.

By a subsequent arrangement with Wells, Fargo & Co. they released $39,000 of the bonds, which I now hold, and when the notes are paid by the R. R. Co. a further amount will be surrendered to me. It must be remembered that this valuable railroad interest was in no sense an asset of H. D. Cooke & Co., but had been thus secured for the benefit of the creditors without cost or expense to themselves.

205 While these negotiations were pending a suit was brought against the members of the syndicate in the courts of New York which ties up these securities till the termination of the suit, which will undoubtedly be in favor of the company.

In meantime sums small in amount have been collected upon different accounts and applied to the liquidation of the liabilities, and various items not deemed worth scheduling have been traded off for debts against the firm.

The standing today is as follows:

Secured claims	$20,485 00
Preferred claims	10,628 30
General claims	89,373 81
Total	$120,487 11

This shows a total reduction of the total indebtedness of the firm of $101,052.34 and of the unsecured indebtedness of $53,467.34, and the estate is worth more today than at date of failure.

This reduction has been brought about by the most rigid economy, by avoidance of all litigation, by cutting down every useless expense, by performing an immense amount of legal work myself, which naturally would have been given to some attorney at a large fee, by advancing my own travelling expenses on all occasions, and practicing economy in every case.

I have paid myself as yet no portion of the fees provided in the deed of assignment and have received no payment for my personal expenses except paper and postage.

206 The unsecured debts of H. D. Cooke & Co. have been reduced more than one-third without touching a material or valuable asset, and the estate is worth more today by a considerable amount than when the failure occurred.

It must follow that as the debts are reduced without materially diminishing the value of the assets that the amount to be devoted to the liquidation of the balance of the debts will be proportionally increased, and if I am allowed to pursue the same course for the next year that I have in the past, I have no great doubt but that I can show an equally large reduction of the liabilities; but any attempt to force any immediate sale of the assets would prove disastrous to the interest of the creditors.

I have given an option to sell the canal interest for a good sum, more than it cost, and hope that it will be accepted, and there is a strong probability that the railroad interest will be disposed of in like manner. If these two assests can be realized upon I believe they will be under good management; the debts of the firm will be privided for.

My wish and aim is to make a settlement that will be satisfactory to every creditor and honorable to the firm of H. D. Cook & Co., and to this end the work of myself and the firm has been devoted with great success thus far, and if I am permitted to conduct the matter in the future as I have done in the past I believe that the

creditors will be satisfied with the result and leave the firm with a clean balance-sheet towards its general creditors.

A full examination of the accounts, receipts, expenditures,
207 and doings of the assignee is solicited at the hands of any party interested.

Thanking you for your good will, I am yours respectfully,

HORACE S. CUMMINGS,
Assignee of H. D. Cooke & Co.

Washington, D. C., Jan. 12, 1886.

208 EXHIBIT H. M. B. No. 2.

Filed May 15, 1893.

SEPT. 7TH, 1886.

Thoughts in Mind for the Past Few Days.

In 18-3 resigned from the Treasury and tried my luck at law business.

Within two months lost about all I had saved and never recovered 1,000 for the $8,000; did well the first year.

The next year Baker left Treasury and wanted to try his hand at law. He came into same office with me. We put up a partnership sign, issued partnership cards and letter-heads, but no partnership existed in fact, except in special cases. Baker proposed general partnership, but, as I had worked up quite a lot of cases which had only to be decided, I could not see the justice of such a division.

In 1875 Baker still proposed a complete partnership, but I could not see justice of same under the circumstances, as I had considerable business and he had none.

I would say that in the latter part of 1874, after the Revised Statutes came out, in examining the same we discovered the section relating to pay of inspectors and we had a good deal of talk about it and we agreed to keep very quiet about — till time enough had elapsed to make the amount due inspectors enough to pay the trouble to prosecute. When that time came I went to Conant's house and brought up the subject and he seemed surprised that we had discovered it, but said that he was glad that I was to have it if any one was to have the collecting of the same.
209 The result was that the next morning I was at Conant's room and he took me into Bristow's room and we discussed the whole subject, and Bristow said that he had no doubt that the amounts would *be* ultimately have to be paid, and said, "If it is to be paid, I am glad, Mr. Cummings, you have found it out, that you will make what there is to be made." The first allowances that were made were paid and the cases were all right till Mahon, the first auditor, out of some spite to Baker, whom he disliked personally, sat down upon the same.

I asked Conant about it and he said he had a talk with Mahon about it, and he said Mahon was very bitter against Baker, and he said he did not see what he could do about it.

I should have said that in winter of 1875–'6, in response to Baker's repeated requests, I consented to make a full partnership of all business. This was not my asking or seeking, but it was entirely because he used to say that we ought to divide even, &c.: that we should take our chances together, &c.

To return to our inspector cases, the whole business—and I will say that Baker never had any cases of any account but these inspector cases—came to a standstill and there was no remedy but to get rid of Mahon. I think I was mainly instrumental in getting him dismissed, as I got up the data and saw McCreary, gave him the points—in fact, did all the work—and I think it was through me—of us two—that Reynolds was made auditor. Then Baker got out with Reynolds, and it became my duty to be general pacificator, and to that end I used to invite him and his family to my house and feed, &c., them, to get on his good side, if he had any, and in this way I got many an action favorable which we would not have had otherwise.

210 In point of money, I think I brought the most in till 1881, and then we both had a setback. Congress would not appropriate for either of our cases. I had many large and good cases, but it was no use to get more adjudications when we could get no appropriations for what I had had decided. I took a hand in outside business with the idea that I might work up something that would give us employment outside of Government business, but it did not work. In 1884 Congress made no appropriations for our cases and I tried hard to get mine referred to Court of Claims, but Randall refused, saying the cases wer- good ones and that the court would agree with us. Baker had his referred, as Randall did not believe they would get through. In 1884 Cooke failed, owing me a large amount. To protect myself I took the estate to do the best I could. I did not neglect any business in any degree, but Baker, having won his test case in the Court of Claims, and I think I did a good deal to aid it, as I had two long interviews with Richardson on the matter and gave him the various reports and decisions on the matter by the solicitor and others and told him in it was a matter of life or death with us, and that he must stand by us, and he said that he could make no promises, but he would look out for me, the case was successful.

Then Baker began to hint that he was doing the most of the work. He would complain that I would not take in pension cases, &c., when I had always told him I did not want such work, and that he could take all the cases of that kind and keep all the fees therefrom.

In the beginning of 1886, this year he would asked me how much I would take for my share of the inspector cases and
211 would say that he — done most of the work on them and should have the fees.

Baker never said anything about the matter till it looked that my insurance and lost-time cases would be a failure. It was in January that he first made such a proposition, and I made no

reply. In August he brought it up again and insisted on his having the greater part of the fees.

Baker in August proposed that we divide all fees on cases taken by us prior to Jan., 1885, and after that date he should have all the fees, and I gave him no reply.

Again, same month, proposed it, and I told him that I recognize that he has — more manual work for the firm in the last 18 months than I have, but that it was because I had already allowances for *for* — than $25,000 fees and have cases, $50,000 new ones, taken by me since Jan. 1, 1885, and my cases, if allowed, will give me more than $50,000 fees, but that it *is* no use in having cases adjudicated then.

Baker has worked well, but it has been on one class of work—that is, writing to the inspectors the same sort of letter. He has their address-, and the whole business could be done by a woman in five days in a month at ten dollars a month; but no, he must do all this writing himself, and I do not call it work, but simply wasting time that he could employ better.

In my cases I do not know where the parties live or did live or who the real parties are in many cases.

August 19th, 1886.—Baker again pushed the matter and said he would give me $15,000 for my portion of the fees in the inspector cases.

I say I do not believe in any such thing and say that I do not know *what* powers we have or what percentage we have,
212 what have been allowed or what will be allowed in future, and he said that "There are the powers; pick them out." I try it, but could make no headway, as he had control of the matters himself and I have been kept in ignorance of their condition. He always keeps the powers or contracts locked up; keeps all data of what has been paid locked up.

He says that a large percentage has to be paid to other attorneys, and in many cases the fees are 10, 15, 20 per cent., when I had supposed that nearly all were to pay 25 per cent. I ask him specifically what he estimates the fees will be, and he has distinctly said that he did not think the fees in the cases allowed would be more than $20,000, and he says that there will not be allowed hereafter more than $75,000 at the most.

August 26.—Baker still persistent. Money is not everything. I do not wrong Baker or any other man. I do not want trouble with him; life to- *to* short to make it a money-grabbing game, and to please him I do or have made up my mind to what I consider an unjust thing to myself, but if he can afford to do wrong I can afford to suffer.

I tell him, relying on his statements as to the amount of fees that will come out of the cases just paid by last Congress—that is, he said the fees were not over $20,000, and that not more than $75,000 will be allowed hereafter—that I will do one of three things: I will take $15,000 for my interest, or I will take ½ fees in all cases held by us prior to Jan., 1886, or that I will take ⅓ fees in all cases, inspectors', and I depend on his doing what he thinks is best for me

and my interest, as he knows about the situation of the cases
213 and their prospects.

Sept. 7th, 1886.—Baker gave me his check for $15,000, saying that was best for my interest, and I depend on his honesty as to representations. This settlement, on his statements, will give $15,000 out of the $20,000 fees on present settlements, leaving him only $5,000 out of this batch; but as he says that the future payments will be about $75,000, on which he will get, calling the settlements $80,000, $20,000 of fees, that will give him $25,000 to my $15,000, or $10,000 more than mine, and that is fair, looking at the matter from his point of view. Wonder how it will come out.

What have I done wrong? Baker complains. I did do one wrong thing, and that was when I did not go into the post-office cases, and I wanted to and talked with Baker about it, but he said we had better not; that we had a good thing in the inspector cases and better not cut into Spaulding's business. We would not like it if any one of our friends did so by ours, so I dropped it, and now Baker has dropped me out.

Is it right? But what is the use of fighting?

Baker partnership was of his seeking; not *mine* wish.

I have never asked his aid, borrowed one dollar, asked his name or endorsement or his help in any way, shape, or manner. I have been careful not to do so. On the other hand, I have loaned him thousands of dollars, raised thousands of dollars for him, gotten his paper cashed, &c.

Not told any one.

He has never lost one dollar by me while — or by *any* friend of mine or by one that I introduced to him. I have lost thousands by those that he has introduced to me, depending on the character he has given them.

214 Suppose my cases had gone through and his had been stopped, as may have been, would he have been as anxious to do this unjust act?

If the allowed and paid cases give more than, say, $25,000 fees in place of his stated $20,000, he has simply deceived me. If future allowances *pre* more than $100,000, he certainly mistakes knowingly.

I won't condemn too hastily.

September 7th, 1886.

I, C. L. Leas, being duly sworn, do depose and say that I made the foregoing copy from a typewritten paper brought me for that purpose by Henry M. Baker; that it is a full and literal copy thereof and of the whole of it; that I personally compared the copy with the said original, and that it is a true copy thereof; and further deponent saith not.

C. L. LEAS.

Subscribed and sworn before me this 10th day of February, 1890.

WM. K. ELLIS,
Notary Public.

I, Henry M. Baker, being duly sworn, do depose and say that the within copy, written on seven sheets of paper, is a true and full copy of an original paper handed me about the first day of August, 1889, by Horace S. Cummings, who then and there said to me that he wrote it at the time and on the date it bears; that said
215 copy was made with the consent of the said Cummings; and further deponent saith not.

HENRY M. BAKER.

Subscribed and sworn before me this 10th day of February, 1890.

WM. K. ELLIS,
Notary Public.

216 EXHIBIT H. M. B. No. 4.

Filed May 15, 1893.

H. S. Cummings. Henry M. Baker.

Cummings & Baker, attorneys and counsellors at law; practice in the U. S. courts and before Congress and the executive departments; offices, 1411 F street N. W.

WASHINGTON, D. C., *Sept. 6th*, 1886.

Received of Henry M. Baker fifteen thousand ($15,000) dollars, in full for all my interest in and right to fees in the so-called inspector cases. This includes all cases in which the fees have not been divided and settled, except one draft to the order of John C. Long and one to the order of James Mitchell, both dated in 1875, whether paid or unpaid, filed, or outstanding.

H. S. CUMMINGS.

217 *Testimony and Exhibits for Complainant.*

Filed May 15, 1893.

EXHIBIT H. S. C. No. 6.

Horace S. Cummings, councellor-at-law, Washington, D. C., No. 1416 F street N. W.

OCTOBER 2ND, 1889.

Mr. Baker:

As I said, I am willing to have a full and free talk of our matter at any time you may designate, with the understanding that the whole matter is discussed, which you have heretofore avoided, and that I can have the papers of our trade of 1886, the payments made and fees collected by you in that year, for those papers are as much my property as yours.

I ask you also to state what you deem a reasonable fee for my services in the power-of-attorney matter. My estimate is one per cent. on the claims, which is more than reasonable when your fee or the main fee was 25 per cent. of the face of the claims, and I estimate that you collected some $280,000 in 1886.

I propose that our discussion be in the presence of some third party, who is a friend of both of us, and I would suggest Frank Mackey, as I believe he would do what is right; but it is of no use for us to talk if we are to split on the point which I say and insist is vital to both our rights.

I cannot see that I am indebted to you in anything, but, on the other hand, I claim that you are largely indebted to me, especially in the trade of 1886.

Do you not think it would be better to have some friend,
218 as I suggest, present to hear both our stories on the conditions stated above?

Yours truly, H. S. CUMMINGS.

P. S.—I was intending to come over and see you yesterday, but your letter shows an animus and a feeling that it makes me think it would be useless for us to talk except in the presence of some third person, for we should be as far apart as when we started.

H. S. C.

EXHIBIT H. S. C. No. 5.

Horace S. Cummings, counsellor-at-law, Washington, D. C., No. 1416 F street N. W.

OCTOBER 4TH, 1886.

H. M. Baker, Esq.

DEAR SIR: As you say that you will not discuss the matter of payments of 1886 and refuse to exhibit the statement of fees collected that year, the very statement on which our trade was based, and as you refuse to set any amount of compensation due me for services rendered at your solicitation in getting the drafts in 1886, though you offered $300 to get the possession in a single one of the cases, I see no way but for you to begin your suit in court. I am sure I have no objections if you have not.

219 If the trade of 1886 was binding and valid, then I am entitled to a fee of at least one per cent. on the claims for services in the power-of-attorney case. If the trade was not binding, then ½ of the entire fees are mine.

I have tried to act square to you in my first offer, but as you did not accept it I withdraw all offers.

I shall be ready to accept service at any time, but had rather you would begin the fight.

Yours truly, H. S. CUMMINGS.

Irrespective of any matters prior to Sept., 1886, I cannot see where I owe you a dollar; in other words, even on your own claim of a valid trade of '86, I think the balance is in my favor since then; but that the court can decide.

In the Supreme Court of the District of Columbia.

HORACE S. CUMMINGS
vs.
HENRY M. BAKER. } Equity. No. 12263.

Be it remembered that at an examination begun and held, pursuant to notice, on the 8th day of March, 1893, at which said examination there were present Franklin H. Mackey and H. O. Claughton, Esqrs., solicitors for complainant, and J. J. Johnson, Esq., solicitor for defendant, personally appeared before me, J. Arthur Lynham, an examiner in chancery of said court, the within-named witness, who, being called in his own behalf and being first duly sworn according to law to tell the truth, the whole truth, and nothing but the truth touching the matter at issue in the above-entitled cause, did depose and say what is hereinafter set out as stated by him.

220

MARCH 8TH, 1893, at 12 o'clock *p.* m.

Met pursuant to notice.

Present: Franklin H. Mackey and H. O. Claughton, Esqrs., solicitors for complainant, and J. J. Johnson, Esq., solicitor for defendant.

Whereupon HORACE S. CUMMINGS, the complainant, having been heretofore duly sworn, was recalled and interrogated as follows:

Direct examination.

By Mr. MACKEY:

Q. Mr. Cummings, there has been filed here by Mr. Baker a letter of yours dated October 5, 1889. Did you write that letter to Mr. Baker (handing witness letter)?

A. I have no doubt that I did.

Q. What have you to say about it?

Mr. JOHNSON: The question is objected to as immaterial, inadmissible, and irrelevant.

A. This letter is one of three letters that I wrote to Mr. Baker about the same time, and in regard to a full explanation of this letter I had my attorney call on Mr. Baker to file the other two letters as being explanatory of this letter, which he has now done, and I will simply say this in regard to this letter: There are two points: first, in regard——

221

Mr. CLAUGHTON: You need not say that; that will do.

Mr. JOHNSTON: This is objected to; the explanation of the letters is inadmissible; the letters speak for themselves.

(NOTE.)—The two letters are here given in evidence by Mr. Mackey and filed by the examiner, marked "Exhibits H. S. C. Nos. 5 & 6" respectively.

Cross-examination.

By Mr. JOHNSON:

Q. Mr. Cummings, are those the only letters that you ever wrote to Mr. Baker, which you have testified to?
A. No; I presume not.

HORACE S. CUMMINGS.

Subscribed and sworn to before me this 11th day of March, A. D. 1893.

J. ARTHUR LYNHAM,
Examiner in Chancery.

The taking of testimony on the part of the complainant is here announced as finally closed.

222 I certify that the foregoing deposition (comprising two typewritten pages) *were* taken down by me in short-hand as an examiner in chancery from the statement- when and as uttered by the deponent thereof; that the same was thereafter transcribed and reduced by me into print and thereupon read and subscribed by the deponent in my presence.

I further certify that my fee of $5.00 for taking, certifying, and returning said depostion has been paid to me by the complainant.

And I further certify that I am not of counsel nor in anywise interested in this case.

J. ARTHUR LYNHAM,
Examiner in Chancery.

223 *Testimony on Behalf of Defendant.*

Filed Apr. 6, 1893.

In the Supreme Court of the District of Columbia.

HORACE S. CUMMINGS
vs.
HENRY M. BAKER. } In Equity. No. 12263.

WASHINGTON, D. C., *Dec.* 12, 1892—3 o'clock p. m.

Met pursuant to notice.

Present on behalf of the complainant, Mr. Mackey and Mr. Claughton; present on behalf of the defendant, Mr. Johnson.

Whereupon HENRY M. BAKER, a witness of lawful age, called by and on behalf of the defendant, having been first duly sworn, is examined by Mr. JOHNSON:

Q. You are the defendant in this case, I believe?
A. I am.
Q. What is your profession?
A. I am a lawyer.

Q. State in what courts of the District of Columbia you are admitted to practice.

A. I was admitted to practice in the supreme court of the District of Columbia on the 14th of June, 1866; in the Court of Claims of the United States on the 14th of December, 1876; in the United States Supreme Court on the 16th of October, 1882, and am also admitted to practice in the various local government courts and commissions.

224 Q. The plaintiff states in his bill that he has been for more than fifteen years engaged in the general practice of his profession as an attorney in the various courts of the District of Columbia. What do you know about that, of your own knowledge?

A. So far as my own knowledge extends, he is not a member of the bar of any court in the District of Columbia.

Q. Were you ever a partner with the complainant in this case? If so, state the circumstances attending the formation of the partnership and when the said partnership began.

A. I resigned from the Treasury Department on the 17th of June, 1874, with the intention of opening a law office in this District. I had had some talk with a friend of mine, who was a member of the bar of the District, about forming a partnership with him. One day, at the general post office, which was then on F street, I met the complainant. He said he had heard that I had resigned and was going to open a law office. I told him that was true. He then asked various questions about what practice I proposed to secure, if possible, and finally ended by himself proposing that I should enter into a partnership with him. We talked it over on several occasions and finally the arrangement was completed.

Q. State what business that partnership covered.

A. It covered all manner of demands or claims against the Government which we might see fit to take.

Q. Was there any subsequent modification of that agreement of partnership?

A. I should have said that at the time of that agreement——

Mr. CLAUGHTON: Was this agreement in writing or verbal?

225 A. It was a verbal agreement. I should have said that at the time of that agreement Mr. Cummings excepted such cases as he had then filed and which he called completed or nearly so—where the evidence was all in. That was the only exception to a full partnership at that time. We opened our office at No. 1411 F street N. W. in September, 1874. There was no further modification of that agreement until September 6, 1886.

Q. When did the partnership end?

A. It ended in August, 1889.

Q. Had the complainant anything at all to do with your resignation from the department and your going into the practice of law?

A. Nothing whatever.

Q. Did the complainant at the time he was negotiating with you

in regard to a partnership represent himself as a member of the bar of the Court of Claims?

A. He did.

Q. Did you so believe?

A. I did so believe then.

Q. What did he say to you about his business in that court?

A. He represented that he had had several cases there which he had conducted to a successful termination, and that he had made a good deal of money out of them, and that he was in the way to get a great many more cases.

Q. Did the complainant ever practice before the Court of Claims or any other court while your partnership continued?

A. He did not.

226 Q. State, if you please, whether or not at any time during the existence of the copartnership you urged him to attend to business before the court; and did you offer, for that purpose, to move his admission to the courts where you had business?

A. I frequently did so. I offered to move his admission to the bar of the supreme court of the District of Columbia, to the bar of the Court of the Commissioners of Alabama Claims, and to the Supreme Court of the United States, but he declined to be admitted to either of the courts.

Q. The complainant in his bill avers that he faithfully performed all his duties as a partner. State, if you please, what you have to say in respect to that.

A. For the first half dozen years of the partnership the complainant was reasonably attentive to his duties, but after that he seemed to lose his interest in the firm and devoted very little of his time to its affairs. He neglected to perform his share or anything like his share of the duties. Whenever I would ask him to do anything he would either say that he could not or, if he concluded that he could, he would neglect to do it. He very seldom ever carried anything through to a conclusion or did the specific work which I asked him to do. He did not work one-tenth part of his time, in any form, shape, or manner, in the office or in connection with any business pertaining to the office or to the firm.

Q. What can you say in regard to the cases you had before the French and American Claims Commission, as to any duties that were performed by the complainant?

227 A. There was no particular case to which I might refer before that court. The petition was prepared by an attorney in New Orleans, from whom we received the case, and the testimony was taken. According to the practice before that court, the verbal arguments were delivered by the counsel for the respective nations, but the claimant's counsel could prepare briefs—first, a general brief, which was responded to by counsel for the government against which the claim was brought, and then the claimant's counsel had a right to reply by brief. These briefs were to be approved by counsel of the government of which the claimant was a citizen. I prepared the first brief, and after a lapse of considerable time the United States replied by brief. I went away on business

and asked the complainant to prepare the brief in reply, but not to file it until my return, stating that it would be necessary to have that brief ready about the time of my return. When I returned I asked him for the brief, and I found only half a dozen scraps of paper, which had no semblance to a brief. I asked him why the brief was not prepared, and he said, Well, I don't know what to do with it; I looked it over somewhat, but I don't know what to say. I then commenced the preparation of the brief myself, and asked him to procure some information for me from the Congressional Library. He went away one day and pretended to have made an examination in the library, and told me there was nothing on the subject in the library. It was merely a geographical question—as to in what province or department a given town was located. I doubted the accuracy of his information, and the next day I went to the Congressional Library myself and asked Mr. Spofford if
228 there *there* was not a gazetteer of France there which would give such information. He said certainly there was, and immediately sent for the book. In fifteen minutes I had the information which I had asked the complainant to procure. I then completed the brief. That is all the service he rendered in the case, and that was a fair sample of his service in others.

Q. State anything touching the cases in the Court of Commissioners of Alabama Claims.

A. In that court we filed quite a number of cases. I was very busy at the time the court was organized, and suggested to the complainant that we ought to procure a great many cases in that court, and that it would be well for him to go up to New England, especially in Maine, and see if he could not gather in a lot of those cases. I had a volume, which had been previously published by the Department of State, giving the names of those who had filed their claims in that department, and I suggested to him that he should take that volume along and make that search. He said he did not think it would be of any use. I urged him, from time to time, to do so, but found that he would not go. I then urged that he would write letters, and he did write letters. I believe that he succeeded in obtaining one case, which was of no value, as it did not come within the terms of the statute. He did not even prepare the petition in that in any form in which it could properly be filed before the court. I had to rewrite that, and it was executed. After the cases were filed, some fifty in number, I urged him to be admitted to the bar of that court, especially saying to him that I wished him to take the testimony in some of these cases. He declined to
229 be admitted to the bar of the court, and said that he did not want to go traveling around taking testimony. I replied that it was necessary that it should be done, and he seemed to have leisure to do so. I was busy in very many ways, and it was necessary that he should take this testimony; but he never was admitted to the bar of the court and never took one particle of testimony in the cases and, of course, never argued any of the cases, but he received one-half of the fees resulting from them.

Q. Something has been said in the testimony-in-chief relative to the Beebe or Little Rock case. Please state what that is.

A. That was a case relating to the title of considerable of the territory upon which the city of Little Rock now stands, and was for quite a time pending before the Land Office. While in that office the complainant attended particularly to it. Then, the Supreme Court having decided that a patent once having been issued it would be impossible for the Land Office to issue a second patent or part with the title which the Government had already disposed of, an attempt was made to procure authority from the Attorney General to bring suit in the name of the United States to set aside the patent issued, which, after months of endeavor, was obtained. Suit was brought at Little Rock, and was managed by a local attorney there until it came to the Supreme Court of the United States on appeal. In the meanwhile several preliminary briefs had been prepared, much of the work upon which had been done by the complainant. When the time for the hearing in the Supreme Court came I suggested to the complainant that, as he has man-
230 aged the case, he must look after it before that court. He said he did not want to. I said, I have other business and you have followed the case and you must do it. He tried to get some outside people to take that case upon a contingent fee and they declined. I then urged him to go up with me and be admitted to the bar of the Supreme Court of the United States and argue that case. He declined to do it. In order to save the case, if possible, and at last to save the reputation of the firm, I hastily reviewed the briefs which had been written before and prepared myself as best I could and argued the case before the Supreme Court. The court decided to dismiss the case upon the ground that it was old and stale. Having thus refused to take any part in its argument or in its conduct, the complainant in his testimony sees fit to suggest that the case ought not to have been lost.

Q. State, if you please, what you know with regard to the commissions due to the collectors of customs for light-houses disbursements, &c.

A. It had been the custom of the Government, under statute, to pay to collectors of customs two and a half per cent. commissions upon their disbursements for light-house purposes. Several years ago Congress neglected to make an appropriation for that purpose, and the accounting officers of the Treasury in their settlement of the collectors' accounts credited them with the amount conditionally—that is, they made when they settled the account an estimate of what would be allowed to them in case there was any money to pay it. A report of the commissioner of customs, approved by the Secretary of the Treasury, was transmitted by the Secretary to
231 Congress, recommending an appropriation for that payment. Congress failed to make the appropriation, but a paper setting forth the amount due to the several collectors was printed and thus became public property. I procured a copy of it and suggested to the complainant that he endeavor to gather in as many of these cases as he possibly could. I pointed out to him the cir-

cumstances connected with them and what it would be necessary to do. I suggested to him that he should write to each one of them. There were some thirty or more of them. One day he wrote to five, I think, and stopped there. The next day he paid no attention to the list, and on the next day I suggested to him that I thought it would be a good plan to go through with the list. He said he had written to five of them and guessed he would wait until he could see what he heard from them. Meanwhile other attorneys were endeavoring to gather in the cases and were gathering them in. I found that he was not going to do anything in the matter and I took up the entire list and wrote to each one of them, enclosing a power of attorney, &c. I collected quite a number of the cases, but upon his letters not a single case was procured. The fees derived from that service were divided with the complainant, that being a fair sample of hundreds of other instances.

Q. Did he in any of the cases look up precedents that would govern those cases or any of them? And, if so, state what he did and what his work amounted to.

A. In some instances I asked him to look up decisions and precedents, and in a few instances he pretended to do
232 so. I was one day using one of these decisions when it occurred to me that I would like to read the whole case. I went to the volume and found that where he had attempted to or pretended to give the exact words used by the court in rendering the decision no such language was to be found in the decision rendered, and that in fact neither the syllabus of the case nor the case itself justified what he had given me as the language of the court. I of course was somewhat indignant, and when he came into the office again I spoke to him about it. He said, Well, that's what they meant to say. Of course, I could not use any of his work without verifying it, and a great deal of it I found could not be used at all.

Mr. CLAUGHTON: Do I understand that the memorandum Mr. Cummings gave you was in writing?

The WITNESS: It was.

Q. Where is that writing?

A. Those notes have been long since destroyed.

Mr. CLAUGHTON: May I ask counsel for the defendant what is the object of this examination?

Mr. JOHNSON: I expect to show all the way through that Mr. Cummings has absolutely done nothing in the firm business.

Mr. CLAUGHTON: The complainant objects to the further taking of testimony in this line, as it is altogether irrelevant to the matters at issue in this suit and is a mere waste of time.

By Mr. JOHNSON:

Q. What can you say now touching the cases called the inspector cases, mentioned in this suit? Please give a detailed statement and history of the cases.

233 A. The so-called inspector cases arose under sections 2733 and 2738 of the United States Revised Statutes. Those

statutes prescribed for inspectors, and those who performed the duties of inspectors, a salary of $3 per day. Prior to the enactment of that statute inspectors had been paid generally less compensation, another section permitting the Secretary of the Treasury to pay even $4 a day. When these sections became law the Treasury Department continued to pay the inspectors at the old rate rather than the statutory rate. Having discovered that, I called the attention of the complainant to it on one day, and his reply was: That cannot be. I assured him that it was, and explained the matter to him. I showed him the statute and all the other matters connected with it. In due course of time I began to gather cases to secure the difference between the amount already paid and the legal salary of these inspectors, which was done in the firm name of Cummings & Baker. After a sufficient number of them had been secured I filed them in the Treasury Department, asking for a settlement of the cases. They were opposed, and it was a year or so before any of them were settled. When the Treasury Department found that the cases were being brought up, instead of attempting to secure a modification of the statute by Congress, they attempted, by various departmental orders, to outwit the law. For instance, there were many officers whose official designation was deputy collector and inspector. In those cases the Government discharged the man as inspector and reappointed him as deputy collector, requiring him to do the
234 full duty of both offices. Those who had been inspectors for service at night were discharged as inspectors and reappointed as night watchmen. Those who were retained under the designation of inspector were limited in amount of pay by commissions giving them $3 per day, not to exceed in the aggregate, for instance, $600 per annum. These and other devices were used by the Government. The statute had been in force about one year when these and other orders were issued by the department. My first effort was to get the Government to settle these cases for the one year, which, after a reference to the solicitor and argument before him, the accounting officers were ordered to settle. Before them I had hearings on almost every case. After that the other branches were taken up one by one and were argued, some in one place and some in another, according to the order in which they were heard. In these several cases I made arguments before the Secretary of the Treasury, the solicitor of the Treasury, the Attorney General, the Court of Claims, and almost daily before the first auditor of the Treasury and the commissioner of customs. These cases, while very simple, so far as the mere statement of the law is concerned, were complicated as to facts, no two cases being exactly alike. These variances, brought about by orders of the department, made their settlement quite difficult and required very many arguments and much time and labor.

Q. Did the complainant have any knowledge of these cases or claims prior to your calling his attention to them?

A. Not any.

Q. State, if you please, whether or not the complainant understood these cases at all.

235 A. He undoubtedly understood the general character of the cases. He understood how to calculate, in a general way, the amount due any individual claimant, and generally, in a rough kind of way, their theory and import, but he took no part in their discussion or in preparing any briefs or arguments connected with them and did very little of the clerical work in connection with them.

Q. You may now state, if you please, how you came to buy the complainant's interest in these so-called inspector cases, and in so doing you may state the preliminaries to the trade and how it was completed.

A. As I have stated, after about 1880 the complainant became very neglectful of his duties as a partner, and from time to time I urged him to his duty. I finally expressed to him that I was dissatisfied, and I wished to discontinue the partnership. He objected very strongly and promised to do better in the regards which I pointed out to him. His amendment was only temporary and partial. So it went on from time to time. In 1883 I again called his attention to it, and again said to him that I was dissatisfied and would like to close the partnership. He again appealed to me to let it go on, and I finally consented. In 1886 I told him that the matter had become intolerable and there must be a change; that I was tired of doing all the work and dividing the money with him. We had a great many talks over the matter, and I suggested to him that I thought we had better separate, and that I was perfectly willing to do so, he taking the cases he had as his own after the first day of January, 1885, and I doing the same. He objected to that.

236 I said 1885 because in the fall of 1884 he had become the assignee of Henry D. Cook & Company, and from that time on had devoted very little time to the firm affairs. I told him that something must be done, and that I would not go on in the way in which things were going. He finally suggested to me that he would consent to it if I made the time 1886. I said that would not be fair. He then suggested that in these inspector cases he would be willing to take one-third of the fees instead of one-half, as had been heretofore divided with him. I suggested to him that perhaps a better way would be for me to buy him out. He entertained that proposition, and, after further talk, gathered together all of the agreements that we had, a list of the cases pending in the departments, a list of the cases which had been suspended or disallowed by the departments, a list of the cases in which our fees were by contract other than 25 %, a partial list of the cases in which the fees were divided with other attorneys, the Treasury Registers for several years, and House executive documents No. 70 and No. 225 of the 49th Congress, and handed them to him. He tied them up and took them away with him. I have no doubt he took them to his home. He kept them for some two or three weeks. I asked him, from time to time, how he was getting along, and he said he was doing something with them. That was his general answer. One

day I came into the office and found the bundle containing the several documents and papers I have enumerated on my desk. He was out. I untied the bundle and put the several papers and documents in their usual places. After awhile he came in, and
237 I said, Well, Cummings, what conclusion did you come to? He said, I don't know much about it, but if you insist upon it I guess we can trade. I wish to say here that at the time he took these papers I made him a distinct offer of $14,000 for his interest in the cases, including the cases which were then in process of settlement. Those were all the cases which were reported to Congress for appropriation in House executive document- No. 70 and No. 225, before mentioned. Those documents had been in the possession of the firm for weeks. Mr. Cummings had had them, and I had seen him figuring in connection with them at his desk. I have here those documents. I am not positive and cannot swear that these are the identical ones which Mr. Cummings had at that time, but I am confident they are such, for the reason that the- contain certain marks which indicated just what he wished to know about them, namely, which of these cases were ours, and which of them had a less fee than the general fee of 25 %. These documents, No. 70 and 225 of the 49th Congress, I file as exhibits in this case.

(The above-mentioned documents are filed herewith and marked Exhibit H. B. M. No. 1 and Exhibit H. M. B. No. 2.)

These documents show exactly the amount which had been allowed on each of the claims, and by adding them up and taking out the cases where the fee was other than 25 per cent. and multiplying the remainder by 25 and by adding the fees in the cases not at twenty-five per cent. would give the gross fees in these cases. I have no doubt that the complainant did so. That would show that the gross fees resulting from these cases was
238 over $30,000. In his bill of complaint, especially in items 6, 7, and 8, he states that I informed him there were only $20,000 of these fees, which statement is not true. The next day after he brought these papers in our talk was resumed. He came in in the morning and said to me, Well, Baker, if you insist upon something being done and if you think it best for me, I will take $15,000. I said, Mr. Cummings, I think that is more than I ought to pay, but you must decide whether it is best for you or not. I have no advice to give in this matter. This is a trade. He said, Well, give me a check. I gave him a check and took his receipt, which is already filed in the case. The next day, which was the 7th day of September, 1886, I left the city, and was gone until the first day of October of the same year. These cases were then in process of payment, and I left with him a schedule upon which was entered the names of several claimants, the allowance made to each, the fee to be received from each, remittance to be sent to him and a blank to fill in the date of such remittance, the amount of each check sent, the number of the check, and the date of the check, which paper remained in the possession of the complainant from September 7th until October 1st. If I

had told him there were only $20,000 in fees in these cases all that he would have had to do to have proved that I had misstated the case would be to have added up six columns of figures, of letter-page size, as shown in the exhibits. I have no doubt he did so add them up, as his testimony indicates. If so, he must have known before my return, if his testimony is true, just exactly what he claims he did not know. I left with him also, when I
239 went away, my bank book and book of checks on the bank, drawn to his order and then signed, without date and without amount. The purpose of that was because there were some twenty cases unpaid, and, as I was going to be gone some three weeks, it was probable that, the powers of attorney being out to these parties, the cases would be returned for settlement during my absence. The drafts, of course, under the powers of attorney, would be made payable to my order, and he could not endorse for me, as they were drawn to me individually. They would have to be sent to me for endorsement before they could be turned into money, and it was the custom of the firm to remit the amounts due the clients immediately upon the receipt of the money. Therefore I left him my checks, with which he drew funds to remit to the parties as soon as he came into possession of the drafts. These sheets show that during my absence the complainant settled thirteen cases, which are shown upon these sheets in his handwriting and marked on the right-hand side with a blue pencil. These were the cases: Lawrence P. Remur, $63; J. A. Riopelle, $5,452.36; Frank Hesse, $732.03; Joseph H. Riggs, $53; R. A. Bensell, $344; Stephen Sharpe, $1,560.04; James E. Waugh, $680.89; Edwin B. Low, $47.70; Samuel Comer, $877.70; Joseph Hardy, $703.10; S. D. Mix, $1,462.20; Cornelius Bosworth, $1,723.41, and Homer W. Stryron, $4,276.64, aggregating $17,976.50, upon which fees were collected to the amount of $4,494.15. The first of these collections appears to have been made upon the 9th day of September, and the last upon the 29th day of September, 1886. There was also a seventh page of these sheets, which showed the amounts paid or to be paid
240 other attorneys for services in these cases. These several seven sheets I file as exhibits in this case.

(The above-mentioned papers are filed herewith and marked Exhibit H. M. B. No. 3.)

The Witness: From that time I conducted the inspector cases solely on my own account and solely by my own endeavors. The complainant never subsequently to that collected any of the inspector cases or deposited any funds to my credit on that account. I may say that the amount deposited by him in bank during the time of my absence in 1886 agrees exactly with the amount specified as having been collected. The complainant states in his testimony that he collected $30,000 on that account. He also says, and this is a fact, that he cancelled the check which I gave him for $15,000 in payment of the amount agreed upon to be paid him, and that in lieu of it he drew three $5,000, there being more than twenty days between the date of the first and the last check. He

says that I stated to him when I handed him the $15,000 that there was not money enough in bank to meet it. That is not true. What I said to him was this: If you do not need that money I wish you would delay the collection of it for a few days, because if these outstanding cases should all come in at once there would not be money enough before you could return the drafts to me for endorsement, and I could send them back to you for deposit to pay your $15,000 and make remittances to clients. There was at that time and all through sufficient money to my credit to have paid the check. He also states in his testimony that he went on collecting this money and collected the money out of which the first
241 $5,000 check was paid. He says he did not collect it until after he had deposited enough to my credit to pay it; that he then went on collecting fees and drew another check and so on. As the whole amount of fees collected, as shown by the papers, is less than the amount of one of the $5,000 checks, his testimony in that respect is undoubtedly incorrect. If his testimony is correct that I told him there were only $20,000 coming out of these cases, in documents 70 and 225, I certainly must have trusted a great deal to his credulity or must have been very foolish to have left with him upon the very day that I concluded the trade testimony which would have convicted me of falsehood, and which I freely left with him and which he held for over twenty days.

Q. After this trade was completed did you or did you not offer to sell the complainant any of these cases? And, if so, state particularly the price and amount you subsequently recovered in those cases.

A. I offered to dispose to him of the cases in the list which was handed to him known as the suspended cases, saying to him that if he wished to exercise his powers there was a chance for him. Those cases are contained in this list which I file as an exhibit.

(The above-mentioned paper is filed herewith and marked Exhibit H. M. B. No. 4.)

The WITNESS: I subsequently recovered from those cases nearly $33,000 for my clients. I offered to dispose of them to him for 5 per cent. The fee in those cases was 25 per cent. I here
242 file as an exhibit a paper which I handed to him, showing the cases where the fees were less than 25 per cent.

(Said paper is filed herewith and marked Exhibit H. M. B. No. 5.)

The WITNESS: I also file as an exhibit a list of those cases known to be outstanding which were handed to him and a list of cases which I handed to him, showing the cases that were still pending in the department, which shows the number then unsettled, as well as those which were in the document.

The above-mentioned papers are filed herewith and marked Exhibit- H. M. B. 6 and 7.)

The WITNESS: These are the identical papers handed to Mr.

Cummings and which, according to his testimony, he took to his house. He has stated that it would have been necessary for him to examine something like a thousand cases in order to have ascertained the amount which these cases represented. In his exhibit already filed in this case there are exhibited 147 cases, and at no time was it necessary for him to examine 150 cases outside of those which were in the schedules which have been filed as an exhibit in order to have fully ascertained what he was selling.

Q. At the time of this sale were there not some of these cases considered very doubtful?

A. All of those on the suspended or doubtful list I regarded as extremely doubtful, as is shown by my offer to sell them to him for one-fifth of the fee if he was willing to take them. In this number there were quite a number of other cases which had not

243 been acted upon and which upon the same principle must have been suspended or disallowed. Subsequently a large portion of those cases by due argument and producing proper evidence were allowed.

Q. State if subsequently to the sale you procured other cases which at the time of the sale you had not knowledge of.

A. From letters received from people who had heard of other persons obtaining their arrears of pay and from different sources I secured probably from 50 to 75 cases subsequently of which I had no knowledge at the time of the sale. The complainant in his testimony states that there are a great many outstanding cases. I do not know where they are, and I freely give him permission, notwithstanding the sale, to prosecute any of those cases that he can find and I will make no claim for contribution in the fee.

Q. Did you tell the complainant pending the trade that the allowed cases then in process of settlement would amount to only about $20,000 or anything equivalent to such a statement?

A. I did not.

Q. Did you say to the complainant pending the trade that the cases pending for settlement would only amount to about $75,000 or $80,000, or words to that effect?

A. I did not.

Q. Pending the trade, what was the largest sum *the largest sum* you offered him?

A. $14,000.

Q. What books, papers, and documents did you furnish him for his inspection as to those cases?

A. The books, papers, and documents heretofore mentioned.

244 Q. What did the complainant say, if anything, when he returned those books and papers?

A. I was out of the office when he returned them. When he came back I think I spoke to him first about it, and he said he hardly knew what to say. There was nothing definite accomplished that day. He asked my advice in regard to it, and I distinctly declined to advise him. I said, We are trading, and you must act upon your own judgment. On the next morning he came to the office and said he had been thinking it over, and if I was amind to

give him $15,000 he would trade. I said that was more than I could afford to pay, but that to end the matter and have an end to the whole thing I would give it to him. I drew the receipt, which he signed, and gave him the check which is in testimony.

Q. Did he or did he not accept the $15,000 in full settlement of the trade and sale?

A. He did.

Q. State, if you please, what was the practice at the department prior to that time, as well as afterwards, as to the delivery of drafts.

A. The practice of the department had been from the foundation of the Government, so far as I have been able to learn, up to about 1885, to deliver the drafts made out to the order of the claimant to the claimant's attorney who represented the case. About that time a new order was issued by the Treasury Department saying that the draft would be issued directly to the claimant. This was
245 prior to the settlement of these cases, in August and September of 1886. As we had always managed the drafts and secured a special power of attorney to endorse each and take out our fees as per contract and remit the balance, that being vastly the easier way, we preferred so to do. The case was represented to the Treasury Department, and finally an order was issued permitting the Treasurer of the United States to withhold in his possession the drafts and to give a description of them necessary to be put into the special power of attorney to secure the endorsement and then to deliver the draft to me upon the presentation of that special power of attorney. That was done with reference to this entire batch of cases, with the exception of one or two where there was a disputed attorneyship or where the claimant had requested that the draft be sent direct to him. This was not a favor especially granted to Cummings & Baker, but was done also for other attorneys practicing before the department. That order was obtained before the sale and set a precedent for such orders in future.

Q. At the time the complainant sold to you his interest in the inspector cases, state, if you please, whether he had or had not offered to take less than one-half of the fees in these cases as his share.

A. He had offered to accept one-third of the fee instead of one-half, according to the original agreement at the time the partnership was formed. As I understood it then and believe now, the trade was made at the rate of $15,000 upon that basis, and
246 that would correspond with his statement that he expected to receive $10,000 from these cases, there being about $30,000 net fees. One-third of that would be $10,000. I so understood the trade at the time.

Q. You may state, if you please, if you allowed or paid him anything besides the $15,000-interest in the inspector cases.

A. He had become the assignee of the firm of Henry D. Cooke & Company, and, according to the ordinary methods of compensation in such cases, as near as I could learn, the amount that he would have received on that settlement would have been about $15,000, which is the amount he has stated in his testimony to be correct.

He became assignee of that firm in the fall of 1884, in October. It was just pending the election, and I was in New Hampshire and was expecting him to follow me, when this failure took place. The first I saw of it was in the Boston daily papers, and I saw from the papers that Mr. Cummings had been made the assignee. He remained here and did not go to New Hampshire. I had no talk with him concerning it until after my return, some time in November. He took the assigneeship without my knowledge or consent and without consulting with me. Upon my return he said that he expected to divide his assigneeship fees with me. In this trade I released him from that, which, according to his own calculation, was equivolent to about $7,500, and which would have made the total compensation for this trade about $22,500.

Q. State, if you please, if you made any proposition to the complainant or said anything to him in 1886 touching the proposition to close the partnership and divide the fees in the cases se-
247 cured prior to January, 1885, each partner to take what, if anything.

A. As I have already stated, that was my first proposition to him—to close the partnership, each partner to retain as his own all cases which had come into the firm through his individual efforts or come to him especially since that date, and to take all the cases received prior to that date and divided the fees received in those cases. He declined this and suggested 1886 instead of 1885. I suggested the year 1885 for the reason that he had become the assignee of Mr. Cooke in 1884, the fall preceding, and after that time had devoted practically no time to the affairs of the firm; but that was all superseded by the trade by which I bought him out in the larger protion of the business we had at that time.

Q. The complainant says in his testimony that you kept the books and papers of the inspector cases under lock and key and that he did not have access to them. What have you to say in regard to that?

A. The statement is not true. It has always been my custom at night to close and lock my desk. These papers were undoubtedly locked up at night. During the day they were not usually locked, and if they were locked the keys were in that portion of my desk which was always unlocked, and I never carried them in my pocket. They always remained on the desk or in unlocked portions of the desk. There never was a time when the complainant could not have access to those papers at his own volition. When I left the city I always left the keys of that portion of my desk where
248 these papers were. Those relating to the settled accounts were contained in the safe, which was entirely his, and in a part of the safe which was open and to which he had access at all times. He knew where they were, and he never suggested that he wanted to see any of these papers at any time—that he did not see them. There was no attempt made to secrete them or withhold them from him.

The further taking of these depositions was thereupon adjourned until Tuesday, December 13, 1892, at 2 o'clock p. m.

WASHINGTON, D. C., *December* 13, 1892—2 o'clock p. m.

Met pursuant to adjournment.

Present on behalf of the complainant, Mr. Claughton and Mr. Mackey.

Present on behalf of the defendant, Mr. Johnson.

Direct examination of witness HENRY M. BAKER resumed.

By Mr. JOHNSON:

Q. Were the books and papers that you turned over to the complainant prior to the sale to you of his interest in the inspector cases full and sufficient enough to permit him, by reasonable consideration of and calculation from them, to enable him to obtain a fair and accurate knowledge of the value?

Mr. CLAUGHTON: I object to the question as calling for an expression of opinion from the witness.

A. They were, and I know it from my practical knowl-
249 edge of the cases.

Q. Could he, by reason of his knowledge of those cases and the fees he had received from them, have sufficient general knowledge of them to enable him to approximate their value?

Mr. CLAUGHTON: I object to the question as calling for an expression of opinion.

A. He could. Any one could.

Q. Can you recall the amount of fees in those cases he had received during some years?

A. He had been paid or received fees in these cases since 1877.

By Mr. MACKEY: Is there any written evidence of that? Have you any written statement of the fees that he received?

A. No; I have not. In 1883 he received over $7,000. In 1885 he received over $18,000. The other years I do not remember.

By Mr. JOHNSON:

Q. Did you or did you not make full and correct answers to the complainant as to every question of fact he asked you in regard to these cases?

A. I did.

Q. Did you give him any advice in regard to them?

A. He asked me when he brought the papers and documents back to the office for an expression of opinion on my part and I declined to give it to him. I never advised him in the matter. The several propositions were whether we should divide the cases in the office from 1885 or 1886, as heretofore stated, or whether he should receive one-third of the fees or whether he should receive
250 this cash payment, with the allowance of the fees in the assignee case.

Q. Please state what the report in documents No. 70 and 225 of the 49th Congress show as to these cases.

Mr. MACKEY: I object to the question because the documents will speak for themselves.

A. They show the names of the claimants and the amounts allowed to each.

Q. Did you have any books and papers that were of any practical value in determining the amounts and the number of the cases which you did not submit to the complainant?

Mr. MACKEY: The question is objected to as calling for the opinion of the witness as to what the value of the papers was.

A. I did not.

Q. Had you ever made any computation as the aggregate amounts due on the cases filed and submitted?

A. Nothing, only a general calculation of each case when filed. I have not aggregated them.

Q. Could you have at that time, without a special examination and computation, made anything like a correct estimate of the value of the cases then pending?

A. In order to ascertain that I should have been compelled to make the same calculations which it would have been necessary for any other person to make.

Q. Please state, if you know, any particulars in which you did not deal fairly and honestly with the matter of the complainant in the matter of the inspector cases.

251 Mr. MACKEY: I object to the question as calling for the opinion of the witness on a question of law and fact.

A. I know of none.

Q. Have you any reason in your mind to doubt that the plaintiff fully understood what he was doing and the effect of his act when he sold to you his interest in these cases?

A. None whatever.

Q. Please state when the complainant first expressed to you any dissatisfaction with his sale to you, as per his receipt dated September 6th, 1889, filed as an exhibit in this case.

A. Some time in August, 1889, when I told him that the partnership must cease existing between us.

Q. What have you to say in regard to his paper dated September 7th, 1886, and entitled "Thoughts in mind for the past few days"?

A. After I had announced to Mr. Cummings that I would remain no longer in partnership with him he first presented to me his claim that the sale was not a just one, and, to illustrate that he had so thought and did so think at the time, he said, I have some memoranda on that subject. He took out a paper and held it in his hand. I said, What is it? He said, Here are some thoughts I put down about that time. I said to him, If you have no objection to my seeing it, I would like to look at it. He handed it over to me. I read it, and after I had read it I turned around and denounced him for having such a paper in his possession for three years and occupying the same office with the man upon whom it reflected and

generally in relation to it and all it contained. He did not
252 have much of anything to say in response, and either then or the next day, I am not positive which, I asked him if he was willing that I should have a copy of it made. He said he had nothing to conceal and handed me the paper. I had a copy of it made and then returned to him the original personally.

Q. What have you to say in regard to the copy of that paper filed in this suit?

A. That copy was made by Mrs. C. L. Leas, who has from time to time done some work for me. When she returned it I asked her if she had compared it, and she said she had. I said to her that I wished to compare it with her, and we compared the copy and original. I retained the copy, and the original I returned to Mr. Cummings. Later on, as is shown by the exhibit itself, she made oath to it as a true copy, and I added my certificate to the same. I wish to add, however, still further, that it was not such a paper as I would receive from anybody in confidence; that I did not receive it in confidence, and that every statement to the contrary is false.

Q. The complainant says in his testimony that the powers of attorney in the inspector cases were first taken in the firm name and then in your name, and that it was most convenient to have it done in that way. What have you to say in regard to this?

A. The powers of attorney were taken in the firm name, as stated, for quite a time. I then discovered that my partner was taking all of his business in his own individual name. I spoke to him about
it, and he said he thought it was more convenient that way.
253 I did not agree with him, and so stated; but he persisted in doing so. I saw that complications might arise in case of his death, and if he was going to do it I would do the same. I turned around and took powers of attorney in my cases in my name. That is the way this came about.

Q. The complainant further says in his testimony that it was a matter of simple calculation to estimate what the amount due to each man was. Is that correct and was it any more difficult in 1886, when you bought his interest in these claims, than it was when the claims were taken?

A. If one knew the beginning of the case, the nature of the case, the end of the service of claimant, and the rate of pay he had received meanwhile, it was a very plain matter of arithmetical calculation. It certainly was no more difficult to make such a calculation at one time that another.

Q. He further says that up to 1886 there were on file one *one* thousand powers of attorney and contracts, and that more than 800 individual claims had been collected. How many would that leave to be collected and for what proportions were the collections made in full and finally?

A. Of course that would leave something less than 200 cases. Many of the cases were final in their first settlement. Some of them received two settlements, and occasionally one received three settlements; but the cases then pending were all shown by the list of cases filed in the department, and that appeared as shown, by the

exhibits referred to before, to be 147. It was in that neighborhood, at any rate.

Q. State, if you please, if his estimate of the number of cases pending is accurate.

254 A. I think it is approximately so.

Q. State, if you please, whether or not it would have been an unreasonable or an impossible task to have made an approximate estimate of the cases then pending and outstanding.

A. It was a very easy matter. It ought to have been done by any one with the possession of the data furnished the complainant in two days' time at the most.

Q. Would it have been any more laborious to calculate the cases filed than the cases outstanding?

A. Certainly not.

Q. Could such calculations have been easily made on the books, papers, and documents in the possession of the complainant during the time he retained them?

A. They could.

Q. Would it have been necessary for him to have examined 1,000 cases to have made the calculation; and, if not, approximately how many?

A. As has been shown, the whole number of pending cases at that time was only about 150. That would have been all that would have been necessary for any person to have made a calculation concerning, with the exception of the number of cases on the paper showing the cases outstanding. Those at that time were, I presume, 20 or 30 more, and they might or might not be secured, as circumstances should determine.

Q. Did the complainant ask you at any time prior to his sale to you for any books, papers, or documents relating to these cases or for any specific information as to any case which you neglected, declined, or refused to give him?

A. He did not.

255 Q. Did he ask you for any information touching these cases which you refused to give him?

A. He did not prior to the sale.

Q. Did you ever say to him that the trade would be a good one for him or for his benefit?

A. I did not; I did not give him any advice on the subject.

Q. Did he ever ask you for the aggregate net amount of the cases then being paid?

A. He did not; he had the documents which showed it.

Q. Did he ever ask you for the aggregate of the cases then filed and in the process of adjustment or of the outstanding cases?

A. Not that I remember.

Q. What was the proceeding of adjusting these claims, and were the claims all of the same character; and, if not, how were they divided?

A. The claims were of the several characters mentioned in my testimony of yesterday. They were, in one form or another, before all the officers which I mentioned in my testimony yesterday.

None of them, however, came to a final adjudication as to the amount due except by a settlement of the account in the first auditor's office and a re-examination and approval of that in the office of the commissioner of customs. Before the other officers and tribunals the questions were questions of law, and before that tribunal they were questions of law and fact put into practical effect by being reduced to the amount in dollars and cents due to the claimant, which was a difference between the amount he had been paid and the amount which was his legal salary under
256 the statute.

Q. Please state who argued those cases, and in that connection state whether or not those cases were easy of settlement.

A. All of the arguments before all of the officers and tribunals were made by myself. The separate law points involved were many, and some of them were argued extensively and were combated on the part of the Government with vigor. It required time and attention and study to meet them.

Q. After 1886 state, if you please, what, if any, aid the complainant gave you in these cases.

A. He was here in the office with me, and, I think, in a few instances he offered to put some affidavits that I was preparing in blank into typewritten manuscript; that was in a few instances. In a few instances as I was preparing special letters to be sent out to my clients, when the money was ready for them, the letters being practically the same, they were prepared on a modified hectograph, and the complainant manipulated that hectograph for me once or twice by his own offer. On one or two occasions he saw the Assistant Secretary of the Treasury in connection with the delivery of the drafts. Otherwise than that I have no remembrance of his ever doing anything.

Q. After the sale mentioned in 1886 what did you do, if anything, that would lead the complainant to believe or suppose that he had any interest in the inspector cases or the fees resulting therefrom?

A. I have no memory or knowledge that I ever did or said anything which could in any manner lead him to suppose that I regarded him as having any interest in or claim to them or
257 for any compensation in relation to anything he did in the cases. Whatever he did was altogether voluntary, and I suppose his services were of that character until he made claim in 1889 for payment for services before the Assistant Secretary of the Treasury in relation to the drafts. I then offered to compensate him for that service.

Q. The complainant, in his testimony-in-chief, says that you said to him, in 1889, that the fees due in 1886 amounted to $20,000 or $22,000. Please state if that is correct.

A. It is not.

Q. The complainant further says in his evidence-in-chief that he could not discover the amounts of the allowances in the inspector cases until 1888. Please tell us what you have to say in regard to that statement.

A. If he could not, I have no knowledge or supposition why he could not. I know I could have ascertained them in 1886 as well as in 1888, and I presume any other person could.

Q. Will you please state the circumstances under which your partnership with the complainant was dissolved in 1889 and at whose suggestion the partnership was so dissolved?

A. The partnership was dissolved at my request and upon my stating to him that I would no longer continue in partnership with him. Then, for the first time, I heard that there was any doubt in his mind concerning the trade of 1886. He was very anxious even then to continue in the partnership, but I was firm in the matter. Then the trouble began out of which this suit and my suit in assumpsit arose.

Q. Was there anything said as to who should retain the
258 old office in that dissolution?

A. I asked him if he would vacate the office, and he replied that he would, and after a time he did so.

Q. Something else is said in this case about the Heustis case. Please give a detailed history of that case.

A. The Heustis case was one of the early cases secured by Mr. Cummings. Mr. Heustis was the inventor of a patent process of casting shot and shell which was used by the Government, especially in the navy yards, during the late war. He asked compensation for the use of that patent. The case has been in Mr. Cummings possession for fifteen years or more, and still remains unsettled. It has been before Congress, and I think is now before the Court of Claims, having been referred there by the Navy Department. Mr. Cummings had always recognized that I held a half interest in the fees resulting from that case, although I think it was procured prior to my connection with him in the firm. That interest came from certain advances that I had made for expenses in connection with the management of the case. Some time before we separated he came into the office one day and said that he had made an arrangement with Mr. Lewis Abraham to take all the testimony in the case and argue it before the Court of Claims. I asked him why he had done so. He said he thought it was the best way. I replied that I thought this firm could manage its own business without employing outside help, and if it could not it had better go out of business. We had quite a talk about the matter, and he begged me not to make a row about it, as he had made what he thought was a favorable arrangement with Mr. Abraham. I asked him what it was, and he said that the fee was to be divided into three parts. Mr.
259 Abraham was to pay the expenses of taking testimony and argue the case. He claimed that Mr. Abraham had some advantages for doing this, being a patent expert, and said that he had given Mr. Abraham the fee as 33⅓ per cent., whereas the actual fee for which he had contracted in the case was 50 per cent. He asked me not to tell Mr. Abraham that he had deceived him in the matter. I still continued to denounce the whole transaction, and I presume Mr. Cummings must have spoken to Mr. Abraham about

it, because subsequently Mr. Abraham came in to talk to me in connection with the matter. I told him that I was dissatisfied with it, but as I had not taken any active part in the case I would leave it to him and Mr. Cummings to do what they had a mind to do with it. From that day on I have had nothing to do with the case.

A. Where were you at the time the complainant was appointed assignee of Henry D. Cook & Company?

A. I was in New Hampshire.

Q. Did he before accepting the appointment advise or consult with you touching his appointment?

A. He did not. The first I knew of it was when I saw it in the Boston daily papers.

Q. After he had accepted the appointment as assignee state how much of his time he gave to attending to his assigneeship.

A. So far as I know, he gave nearly all of his time to the assigneeship. At least he gave not one-tenth of his time to anything pertaining to matters of the firm proper.

Q. State, if you please, how much, so far as you know, the complainant secured in fees in his own cases from 1884 to 1889,
260 when the firm dissolved.

A. I know of only $5,800, and I have not received my share of that.

Q. Can you tell of any other cases in which he collected fees that were not turned over to you?

A. I have not such accurate knowledge that I would wish to state.

Q. You have, I believe, a suit at law pending against the complainant, which suit resulted in the filing of this bill by the complainant against you to restrain the prosecution of that suit. Is that so?

A. I have such suit at law.

Q. The plaintiff in his cross-examination says that you and he had the right to take any kind of claims on your own individual account and instances pension business. Please state what was the understanding in respect to that.

A. I have never had such an understanding as he states. The firm agreement was that all of our professional business should be on joint account. While I was working more hours in a day than he was working in a week I asked him on several occasions to attend to business out of which I thought fees could be derived. I once suggested to him that the pension business opened up a great field, and that other people were going into it and making a great deal of money. I suggested that he give his time and attention to that. He replied that he would not do anything with the pension business; that he despised such small things and he was not going
to do any- with it. He said that if I wanted to I might do
261 it and have all the fees. I presume that is what he refers to.

Q. If you have not already answered as to the various times that you proposed to the complainant to dissolve the partnership, please state it now, with the particulars as to why you so desired.

Mr. CLAUGHTON: In order that it may not appear that we are listening to testimony without objection, I will interpose an objection to this testimony upon the ground that these questions are entirely irrelevant to the matters in issue in this suit. They are therefore objected to on that ground.

A. I distinctly remember of proposing such dissolution to him in 1883 on the ground that he was not performing his share of the partnership business; that he was generally gossipping and talking in a way which it was improper for one partner to talk in regard to another. In 1886, upon the same ground, I again suggested it and yielded only upon receiving charge of the business, as heretofore shown. I again suggested it in 1889, when the partnership was dissolved.

Q. The complainant says that you urged him only for a settlement of the expenses between 1886 and 1889. Will you please state what the facts were?

A. It is not true. I urged him in 1887 and in 1888 and in 1889 not for a settlement of expenses only, but for a settlement of everything that was outstanding between us, and I did it persistently.

Q. The plaintiff has said a great deal in his testimony about the Hellen note. Will you please state the facts and circumstances touching that note?

262 A. Mr. Hellen was a clerk in the office of the commissioner of customs. He came to me one day and said that he wanted to borrow a thousand dollars; that he had as security some property in which he had a life estate, and that he also would get his life insured and make that good, and had the insurance assigned properly. He offered a good inducement for the use of the money. I reported it to Mr. Cummings, knowing that he had at that time some funds on hand. He wanted to know what I thought of it, and I told him that I believed it to be perfectly safe. He finally said that if I would go in with him on it he would loan the money. I said, All right; I will do so; and the loan was made. Mr. Cummings retained all the papers in connection with it. The life insurance ran for one year. About that time I went to Mr. Hellen and asked him if he had renewed his life insurance, and he said he had. I asked him if he had the receipt, so that it might be filed with the other papers, and he said it was at his house, but he would bring it down in a day or two. From time to time, as I saw him about it, he did not remember to bring the receipt, and shortly afterwards he was taken sick and in a few weeks was dead. Subsequently it appeared that the insurance was not renewed, and consequently the insurance and the life estate both went out together. Under my agreement I was bound to Mr. Cummings for one-half of the money. I asked him if he cared for it then, and he said he was in no hurry, and so the matter went on. It went on for several years in that way, he understanding all the time that whenever he wanted one-half of that money, with the interest, he could have it by asking for it. In 1888, at one time, I asked him if he
263 had figured up the amount, for I wanted to pay him. He figured up the amount. I believe he states it was thirteen

years after the transaction, but at any rate it was a long time. He had no note and nothing to show the transaction except my word and personal honor that I would assume one half of it. To show that I paid him in full I file herewith a cancelled check with which I paid him, showing that the amount was $810. (Said check is filed herewith and marked Exhibit H. M. B. No. 7½.)

Q. The complainant, in his testimony, refers to an interview that he alleges that he had with the Assistant Secretary of the Treasury, Mr. Conant, and Secretary Bristow. Please state whether or not any of the interviews complainant may have had with those gentlemen were at your request touching the inspector cases?

A. They were not done at my request, and I think they were an injury to the cases. When I found out that he had been about it, I protested and urged him never again to take any action in that semi-social-interview way in relation to cases without first consulting me, which request he never conformed to.

Q. State what were your personal relations with Mr. Bristow, Mr. Mahan, and Mr. Reynolds.

A. I never had but one interview with Mr. Bristow in my life. That was not of over five minutes' duration, and was entirely pleasant. He did what I asked him to do. If he, as the complainant says, has any hostility to me, I never was aware of it, and I do not believe it. So far as Mr. Mahan was concerned, he was
264 the first auditor of the Treasury; it was his duty to state these accounts, and he absolutely refused to state the accounts or to take any action in connection with them. He sat there in his official capacity as a block to them. He was a man of very bad personal habits, and, as he would not do his duty, I tried my best to get him removed from the office, and in the course of time he was removed. Mr. Reynolds succeeded him in that office. I unquestionably aided Mr. Reynolds considerably in his appointment and was always on good terms with him, so far as I know, during his incumbency in the office. Of course, we did not always agree in regard to these cases or in regard to individual cases; but we were always on friendly terms, and on such terms as is usual between an officer of the department and an attorney practicing before him. Any representations that our relations were not such, if true, is based upon something of which I never had knowledge.

Q. Touching these inspector cases, the complainant has said in his evidence that he wrote fully as many letters as you did, and did as much work in and about these cases as you did. Please state what the facts are in that connection.

A. He did not write one letter to my one hundred, and his proportion of the work was no greater.

Q. Were these inspector cases filed when received, or were the powers of attorney retained for a time, ordinarily?

A. Ordinarily they were filed upon the same day that the power of attorney was received. Of course there were exceptions to that, but that was the general rule.

Q. The complainant has said in his testimony that he had no

business to look into your desk, even when unlocked. Do
265 you know of his examining matters in your desk during your copartnership?

A. During that time the usual relations in regard to papers pertaining to a firm which I suppose exist between partners existed between us. I have frequently seen him pick up papers at my desk and go to my desk for papers, to which I never objected, and which I did not suppose was dishonorable on his part.

Q. Do you know whether or not there was a more appropriate or better place for keeping these papers than the place in which you did keep them?

A. There was no other place in the office in which they could be appropriately kept.

Q. Did you ordinarily leave with him when you left the city the keys to that part of your desk where these papers were kept?

A. I did.

Q. Did he, prior to 1889, complain to you that he did not have access to these papers?

A. He never did.

Q. The complainant says in his testimony, speaking in connection with his "thoughts in mind," that he interviewed Judge Richardson by your advice and at your request. Please tell us what the fact was about that.

A. It is not true that he interviewed Judge Richardson at my request or by my advice, and when I first learned of it I regarded it as indelicate and improper, and I so regard it now.

266 Q. He also says that he permitted you to take a copy of his "Thoughts in Mind" in confidence, and that he did not expect you to let that paper pass out of your hands to be copied. What have you to say in regard to that?

A. When I asked him for permission to make a copy of it he said that he did not care who knew it. It was not such a paper as I would receive from anybody in confidence, and I certainly could have had no desire to retain a copy of it simply to read it in privacy.

Q. The complainant also refers to his services in your behalf in getting from the Treasury drafts issued in payment of the so-called inspector cases. Please state the facts in regard to this, and whether or not a similar arrangement had been made prior to the sale of September 6, 1886, and whether what he claims to have accomplished for you was done by the Secretary of the Treasury for other attorneys.

A. The same rule applies to drafts issued prior to the sale of 1886 as subsequently, with some unimportant modifications. The precedent was established in connection with the drafts of 1886, and the same rule was applicable to many other attorneys. Subsequently the arrangement was only to continue that order to drafts issued later. I asked the complainant on a few occasions to see the Assistant Secretary of the Treasury, Mr. Maynerd, who had charge of these matters, for the reason that the complainant claimed to be on terms of especial acquaintance with him, through his connec-

tion with him in the D. K. E. Club, and that he could approach him more readily than myself. Upon a later occasion I
267 found no difficulty in having the arrangement continued without the services of the complainant.

Q. Did the complainant succeed in having any drafts retained for you in any cases where the attorneyship was in dispute or when the claimant asked to have the draft sent to him?

A. He did not.

Q. State whether or not at any time you offered him for his services — any case $300.

A. I did not.

Q. What have you to say in regard to his claim for pay for his services in this matter of the inspector cases?

A. I was trying to get him to pay me a balance due, which is now in suit, aggregating some $2,700. He then, for the first time, suggested to me that he ought to have pay for his services in procuring the drafts for me. I said, Very well, if you think so I am ready to pay you any reasonable compensation. I unquestionably did as much for you in connection with the Cook assignee matter, but I am making no charge for it. I asked him what he thought it was worth and I could get no definite response from him. I finally offered him $500 and asked him if that would be satisfactory. He refused it, and there the matter ended.

Q. State, if you please, when the complainant first intimated to you that he might bring suit to set aside the sale of September 6, 1886, of the inspector cases.

A. After I informed him that unless he paid me the balance due, $2,700 and more, I should bring suit against him for that amount.

Q. Was that before or after he claimed to have rendered
268 you the services touching these drafts?

A. It was about the same time, and I think afterwards.

Q. Did he ever offer to you to call it even with you if you would not push your demand for $2,700, included in your suit at law against him, and say that he would not raise the question as to the validity of the sale of September 6, 1886; if so, what did you reply?

Mr. CLAUGHTON: I object to this question, as it seems to refer to an offer of compromise or settlement, and therefore is not competent testimony.

A. On several occasions, as I was urging him to pay what he owed me, he made this suggestion. I at once declined upon every suggestion of it, saying that I knew he owed me that money, and if I owed him any money that I was always ready to pay it, and that the sale of 1886 was a straightforward, honest transaction, and that I should stand by it and submit to no blackmail.

Q. What assistance, if any, did the complainant render you in 1886 in any of the cases?

A. Nothing, except as heretofore stated.

Q. State, if you please, whether the complainant collected and deposited any money for you in these cases after that year.

A. He did not collect any money in any of the inspector cases or

deposit any money in those cases to my credit after the first day of October, 1886.

Q. How do you know that fact?

A. From the fact that the sheets in which these accounts
269 are kept do not show any entry in his handwriting, and that there was no deposit made in bank to my credit which I myself did not make.

Q. What have you to say with regard to the case of the steamer Baltic and the Cosgrove and McCloskey coal cases, referred to by the complainant in his testimony?

A. The case of the Baltic was that of a steamer. The case of Cosgrove & McCloskey was the coal case. The complainant has testified that he collected moneys in these two cases, and, although under our terms of partnership he was not under obligations, he divided the fees with me. Both statements are untrue. Our partnership began in 1874, with the limitations heretofore stated, and the power of attorney on file in the papers regarding the steamer Baltic bears date December 16, 1874, and hence was within the terms of our partnership. The application in the case of Cosgrove & McCloskey for payment for coal used by the United States, on file with the papers, is dated September 15, 1875, and the power of attorney authorizing the prosecution of that case is dated May 8, 1875. These dates I have taken from the papers in the several cases from my own personal examination. The complainant is in error as to the papers procured by me in the coal case. He states that he was in Pittsburgh, and wrote to me to secure from the office of Mr. Charles Ewing, upon an order which he sent me, certain papers, which I did. The facts are that the complainant procured that order in Pittsburgh and brought it here himself and endeavored to secure the papers. He was at that time a member-elect to the New
270 Hampshire house of representatives, and early in June went there to attend to the session of the legislature, leaving the order with me. Mr. Ewing was out of the city a large portion of the summer, and before the adjournment of the legislature and the return of the complainant I had found Mr. Ewing and secured from him the important papers in the case, which I handed to Mr. Cummings upon his return, which was probably some time in September.

Q. I wish to recur once more to the sale by the complainant of his interest in the inspector cases to you. Please state whether or not there was, just before or at the time of the same, any fact, any paper or papers or documents that were within your knowledge, touching those cases, from the beginning up to the time of the sale, that the complainant was not aware of.

A. No paper whatever of any importance in the determination of the value of the cases which he was proposing to sell.

Mr. MACKEY: I object to the foregoing question and answer upon the ground that it would be impossible for the defendant to know what the complainant knew.

The taking of the depositions was thereupon adjourned until Saturday, December 17, 1892, at 10 o'clock a m.

271 WASHINGTON, D. C., *Dec.* 17, 1892—10 o'clock a. m.

Met pursuant to adjournment.

Present on behalf of the complainant: Mr. Claughton.

Present on behalf of the defendant: Mr. Johnson.

Whereupon C. L. LEAS, a witness of lawful age, called by and on behalf of the defendant, having been first duly sworn, is examined—

By Mr. JOHNSON:

Q. State your full name.

A. Cordelia L. Leas.

Q. Will you look at the paper I now hand you, dated September 7, 1886, and state in whose handwriting it is, if you know?

A. It is in my own handwriting.

Q. Will you please state, if you can, when you wrote that paper?

A. I wrote that paper in 1889—about August, 1889.

Q. At whose request?

A. At the request of Mr. Henry M. Baker.

Q. Please state whether or not this paper is a true copy of the original paper handed you to copy, and with whom you compared it with the original, if you did so compare it.

A. That paper was handed to me by Mr. Baker, and it is a literal copy. I made a literal copy and it was compared. I compared it with Mr. Baker afterwards.

272 Q. Is this your certificate made before Mr. Ellis on the 10th day of February, 1890?

A. Yes, sir.

Q. The certificate there made is true in ever- respect, is it?

A. It is.

Cross-examination.

By Mr. CLAUGHTON:

Q. Do you know where that paper had been between the time of you- copying it and the time you made the certificate to it?

A. No, sir.

Q. Did you at the time you made this certificate to it compare it with the original?

A. No.

Q. You do not know in whose possession it had been from the time you copied it until you certified to it?

A. I do not know. It was in Mr. Baker's possession, I suppose.

CORDELIA L. LEAS.

Subscribed and sworn to before me this — day of ——, 1892.

——— ———,

Examiner in Chancery.

The further taking of these depositions was thereupon adjourned until 2 o'clock p. m., Thursday, Dec. 22, 1892.

273 WASHINGTON, D. C., *Jan'y 5*, 1892—3 o'clock p. m.

Met pursuant to adjournment.

Present on behalf of the defendant: Mr. Johnson.

No appearance on behalf of the complainant.

The taking of these depositions was thereupon adjourned, at the request of Mr. Claughton, counsel for complainant, until Saturday, January 7, 1892, at 1 o'clock p. m.

WASHINGTON, D. C., *Jan'y 7*, 1892—1 o'clock p. m.

Met, pursuant to adjournment, at the office of William Herbert Smith, examiner in chancery.

Present on behalf of the complainant: Mr. Mackey and Mr. Claughton.

Present on behalf of the defendant: Mr. Johnson.

Cross-examination of HENRY M. BAKER.

By Mr. CLAUGHTON:

Q. Mr. Baker, how many cases did the firm of Cummings & Baker have before the supreme court of the District of Columbia?

A. I do not think the firm as such had any. I do not remember that they had.

Q. There was no necessity, then, for any member of the firm qualifying in that court, was there?

A. I qualified there. You can inquire of the other mem-

274 ber about his qualification.

Q. Do you remember whether or not Mr. Cummings ever had a case there of his own?

A. I do not know that he had.

Q. How many cases did you argue in the Court of Claims?

A. I recall four at this moment.

Q. Just name them to the stenographer.

A. There was the case of Wallace against The United States, the case of Adams against The United States, the case of Bradford against The United States, and the case of E. G. Jayne & Company, a departmental case, being for the distributive share of a moiety. It was a case in which it was to be decided which of the parties was entitled, the United States not objecting that it owed somebody.

Q. What were the other three cases?

A. I have given them.

Q. You gave the nature of the last case.

A. The Wallace case was on account of some bonds or securities of the District of Columbia. The Adams case and the Bradford case were inspector cases.

Q. Test cases?

A. Test cases; yes, sir.

Q. How many cases did the firm of Cummings & Baker have before the Supreme Court of the United States?

A. One.

Q. What case was that?

A. That was the case of the United States against Beebe and others.

Q. How much did that case involve?

275 A. I do not know. It involved the title to a considerable portion of the city of Little Rock, Arkansas.

Q. It was a very large case, was it?

A. Yes, sir.

Q. Who argued that case in the Supreme Court?

A. I did.

Q. What was the result?

A. The result was that the court sustained the demurrer, which turned upon the point that the case was not brought in season.

Q. That is, you lost it, did you not?

A. The appeal was not sustained.

Q. That was a pretty heavy case, was it not?

A. I told you what it was.

Q. You said you had estimated the value of it, did you not?

A. I don't know that I ever made any estimate. I have heard it estimated all the way from hundreds of thousands of dollars up to millions, provided it could have been sustained in all its points.

Q. Do you remember whether or not Mr. Cummings advised that some attorney more familiar with the practice in the Supreme Court should be retained in that case?

A. I was not aware of it.

Q. Do you not remember that?

A. I asked Mr. Cummings, as he had given more attention to it while it was pending in the Land Office and other places than myself, to take charge of it and argue it himself, and he declined.

276 I asked him to take charge of it and attend to it, and he informed me that he had not succeeded, or did not succeed, or did not try, I don't know which, and the time was approaching and somebody must argue it, and I did it at his request.

Q. You do not remember that he counselled that somebody more experienced in the practice of the Supreme Court should be retained?

A. I don't think he did.

Q. Are you prepared to swear positively that he did not?

A. I would not swear positively that in various talks that was not suggested, but I don't think it was.

Q. Is that the brief you used in that case (handing a paper to witness)?

A. It is.

Q. How much of that brief did you prepare?

A. I don't know, sir.

Q. Look at it and see.

A. I prepared a considerable portion of it. The whole of it was rewritten by me, and I had some notes which had been put in by Mr. Cummings, but, as I stated in my testimony-in-chief, Mr. Cummings was not reliable in these matters, either upon the reference to his cases or in his quotations, and I had had experience enough

in it, so that I would not sign the brief until I had been through it. His form of expression is not good, and the better portion of it I rewrote entirely. The other portions of it—that part of it—is in his own language.

Q. Examine that and tell me what you did prepare.

277 A. I cannot tell you, sir, at this date. I simply know the general fact.

Q. Do you know whether or not the brief as prepared by Mr. Cummings had been printed?

A. There were some preliminary briefs printed, or one or two of them, which I think was signed by the firm name. Part of it I had something to do with. How much of those were incorporated in this I cannot tell you without making an examination.

Q. Could you tell from examining that brief?

A. From examining this alone, no, sir.

Q. You would not recognize your handiwork, then?

A. I should not, in that distribution of it; nor, sir.

Q. Mr. Baker, I wish you would charge your memory and see whether or not you can recall that Mr. Cummings prepared a brief and that you added about a page and a half; that your page and a half was added to his printed brief, and they were bound up together.

A. I do not recall any such state of affairs, and I don't care whether it was so or not for the purposes of this case.

Q. What I wanted to get at was simply this, if it is possible for you to take time and examine that brief and tell us how much of it was yours and what part of it was the brief of Mr. Cummings.

A. I am willing to give an answer to that; that brief is a mosaic, and it will be impossible for me at this time to separate verbally what was mine and verbally what was Mr. Cummings'. I

278 never was satisfied with that brief because there was so much of Mr. Cummings in it.

Q. Mr. Cummings seems to have reciprocated your attachment in that respect because there was so much Baker in it.

A. I am entirely satisfied that such was the case.

Q. We will pass from that. You have testified, Mr. Baker, in respect to the amount of work you did in these inspector cases. What branches of your business were under the charge and care of Mr. Cummings?

A. He generally took the cases that related to old war claims. There were some exceptions, but that was the general division.

Q. Who had the cases before the Interior Department?

A. That depended upon what they were and the circumstances connected with them. He had some and I had some.

Q. Who had those before the Attorney General?

A. Both of us. I presume I had some. I don't know whether he ever went there or not.

Q. You cannot say now to what extent he prosecuted the business of the firm outside of these inspector cases?

A. What do you mean; what proportion of it?

A. No.

A. Who had the supervision and general control, just as these cases were committed to you? To whom was committed the prosecution of your matters before the other departments of the Government?

A. There was no division of that kind.

Q. That is to say, you had exclusive control of these in-
279 spector cases?

A. No, sir.

Q. Then nobody had any exclusive control of any cases?

A. Nothing, only by general consent.

Q. Of course, it had to be by general consent.

A. That is, either one of us had some business which we generally carried on, unless the other one was asked to assist or the other one was out of the city, or something of that sort.

Q. There was primarily a distribution of business of certain classes between the members of the firm, and occasionally one asked the other to assist in his particular department; is that what you say?

A. No, sir.

Q. State what you do mean.

A. I mean to say there never was any formal distribution of business in the firm; but that as circumstances might dictate, or as a person may have had a case of a like nature, it ordinarily passed into the control of that man. There was no written or established distribution of the business.

Q. Was there any actual distribution of the business?

A. Not an unchanged distribution of the business.

Q. Was there ordinarily an actual distribution of the business?

A. Ordinarily certain cases were managed by Mr. Cummings and certain cases by myself.

Q. Do you mean certain cases or certain kinds of cases?

A. Well, certain kinds of cases. To illustrate, he gen-
280 erally took charge of what was known as the old war claims, and I had everything arising out of the revenue laws.

Q. Can you name now any cases which you prosecuted before the Land Office?

A. I cannot remember the names of the cases that I had or that he had.

Q. I am not asking about "he." I am asking about you.

A. No.

Q. Can you name any cases you prosecuted before the State Department?

A. I do not now recall any that I ever had before that department.

Q. Before the Navy Department?

A. I had some business before the Navy Department, but I cannot tell you the names of the cases.

Q. How many cases had you there?

A. I don't know, sir.

Q. Many or few?

A. Few.

Q. How many before the Attorney General?

A. I was before the Attorney General in some of these inspector cases.

Q. I refer to cases outside of those.

A. There were some other-; I can't tell you what *there* were.

Q. There were how many?

A. I cannot tell you.

Q. Many or few?

281 A. There were not a great many. I cannot designate the cases that I had through a fifteen years' practice.

Q. In your testimony, Mr. Baker, you stated very positively that you had been for some time insisting upon a dissolution of the firm of Cummings & Baker. Did I apprehend you correctly?

A. You did.

Q. State how strenuously you insisted upon that dissolution and when it began.

Q. I suggested it, I think, once or twice in a general sort of way, before 1883. In 1883 I very strenuously urged it, and Mr. Cummings as earnestly deprecated it. He said he did not see any reason why we should separate.

Q. I am not asking as to what Mr. Cummings said, but what you said.

A. I said he was not performing his duty as a partner.

Q. In respect to your urging the dissolution of the partnership. I do not care about the grounds of it.

Mr. JOHNSON: He will have to state the grounds.

A. His personal conduct was not satisfactory to me in relation to firm matters and in relation to my own private matters, and I was not contented to remain with him.

Q. Now, having made your little speach, full of bile, will you answer my question? Did you strenuously urge a dissolution of the concern after 1883 up to the year 1886?

A. I mentioned it in 1885, I am confident. I could not say whether I did in 1884 or not.

Q. Did you in 1886?

282 A. I did.

Q. Were you insisting upon it at the time that this assignment of the inspector cases was made to you?

A. I was.

Q. Was your insistance as urgent or less urgent than it had been before?

A. It was more so. My point was that I wanted the firm to end.

Q. And that spirit on your part and that urgency was insisted upon by you at the time of this sale; or had you relented any before that time?

A. I think that was still a matter that was open at the time of the sale.

Q. I do not know that I understand you. Were you at that time still pressing for a dissolution of the partnership?

A. I was.

Q. How long did you remain partners after the assignment of his interest in the inspector cases?

A. About three years, though I urged the dissolution afterwards——

Q. Now you see you are not answering any questions of mine.

A. If I may be permitted to state, I think I am answering as properly as your witness did.

Q. I am not comparing witnesses at all. Is it a fact, Mr. Baker, that though at the time of the assignment you were urging a dissolution of the copartnership, you still continued the copartnership three years after the assignment?

A. The fact is it was continued because I could not get
283 him to agree to discontinue it.

Q. But you could have resorted to legal process?

A. Certainly.

Q. Mr. Baker, I understood — to testify that on the day that you gave the check on your bank for the $15,000 that there was sufficient money in bank to pay it.

A. Yes, sir.

Q. You still say that?

A. I do, sir.

Q. And there was sufficient money in bank to pay it the next day?

A. Yes, sir.

Q. You have no doubt about that at all?

A. Not a partic*al*.

Q. In reference to those two books which you have in your hand, marked Exhibit- H. M. B. Nos. 1 and 2, I understood you to say these were the identical books you had handed to Mr. Cummings.

A. Yes, sir.

Q. Do not these books contain all the inspector cases, as well as those represented by other attorneys as those represented by Cummings & Baker?

A. The- contain all those that were at that time reported to Congress for appropriation, whoever might be the attorneys.

Q. And there were other cases represented by other attorneys?

A. There were.

Q. Then from looking at these books would Mr. Cummings have been able to tell what was the amount of the cases of Cummings & Baker?

284 A. He would.

Q. How?

A. Because they contain marks which were explained to him, showing which were the Cummings & Baker cases and which were not.

Q. What marks?

A. In this book, No. 70, I think all the cases were Cummings & Baker cases, and in No. 225 those that have not the check-mark before the number were not Cummings & Baker cases. They are also checked in the interior, after the name. Those in both books which

have the blue pencil mark after the name were Cummings & Baker cases where the fees were less than the ordinary fee of 25 per cent.

Q. You have looked at those marks?

A. I have, sir.

Q. Who made them?

A. I did, sir.

Q. You are prepared to swear that these marks were on these books, and that these are the identical books that you handed to Mr. Cummings?

A. I did not say so.

Q. Are you prepared to say?

A. I am prepared to swear that I made the marks, and, as I stated in my prior testimony, I believe those to be the books which I handed to Mr. Cummings and explained to him the nature and meaning of those marks.

Q. You still adhere to that?

A. I do, sir.

285 Q. Will you state whether Mr. Cummings did not have copies of those very records himself?

A. Of those books?

Q. Yes.

A. There were ordinar-ly two or three copies of those reports procured either by Mr. Cummings or by myself, and sometimes they were on his desk and sometimes they were on mine. I know Mr. Cummings had those books or similar books long before the trade, and I think those were the identical books that he had and took home with him.

Q. You stated in your deposition that the books he took home with him were the books you handed him?

A. The books that I put into the pile all together.

Q. You say that he had some of these books before the trade?

A. Yes, sir.

Q. And that you thought he took those home with him?

A. No; I say he had some of those books before the trade; before he took the books and papers to his house; and I think, at the time he took the books and papers to his house, those identical papers were taken with them.

Q. You mean to say these books were furnished by you, and he took these along with the others that he had—not furnished by you?

A. I don't know whether he had any at his house or not. I simply know this, that along with the books and papers taken by him to his house were marked copies, showing just what those show, and I believe those to be the books which he took and which I put into the file of the books and papers which he took along

286 with him.

Q. I understand you to say you swear positively that you handed to him books like these?

A. Or those.

Q. Or these identical books, with these remarks, checking off the cases that belong to the firm of Cummings & Baker?

A. I do so, sir.

Q. What was your purpose in checking off those things for him?

A. To give him the facts which I had compiled from the documents which he had.

Q. Be a little more definite. What was the reason you wanted him to have these facts?

A. That he would know what he was trading.

Q. In other words, you handed him, in the fairness of your negotiation, these books with these check- on them for the purpose of giving him all the information necessary for deciding, upon his own judgment, whether he would make the trade then proposed?

A. As to that part of it, I did.

Q. Now, I ask you, Mr. Baker, if, at the time you handed him these books for that very creditable motive, you did not have a paper which showed distinctly and clearly upon its face exactly what number of cases had been already appropriated for and the amount.

A. I do not think I had the paper at that time. I had the paper which was in evidence here made up somewhere along that time, but my impression is it was made up subsequently.

287 Q. I hand you now a paper marked H. M. B. No. 3, and ask you to state what that paper is.

A. That paper contains a list of the parties for appropriations made in the year 1886, according to the documents 70 and 225, which were in the attorneyship of Cummings & Baker, showing the name of each client, the amount allowed him, the fee according to the fee agreement, the amount which should be remitted to him, the date when it was remitted, the amount remitted, the number of the check by which it was remitted, the date of the check, and also another sheet which shows, in part at least, the amount paid to other attorneys for assistance in these cases.

Q. Now, Mr. Baker, would anybody invesitgating that subject with these papers in his possession have any occasion to look at the documents which you have just been testifying about?

A. Not if he were satisfied of the accuracy of the other paper.

Q. In other words, does not this paper about which I am now questioning you contain all the cases of Cummings & Baker that are mingled with all other cases in these public documents?

A. That paper is supposed to contain them.

Q. Will you state whether it does or not?

A. So far as I know, it does accurately.

Q. Then if this paper had been handed to Mr. Cummings there would have been no need for checking off anything in the other book, would there?

A. Not except by way of comparision.

288 Q. He could have gotten no further information from the congressional documents in respect of the matters that you were negotiating for than is contained in this paper?

A. I presume not.

Q. Why, then, did you not hand him this paper?

A. Because I think it was not in existence at that time.

Q. When was it prepared?

A. It was prepared just about the time the drafts began to be issued. It was after the appropriation was made which was directed by documents numbered 70 and 225.

Q. Have you not already testified that you handed him this very paper the day after the transaction?

A. Yes; but I was talking about the time he took the books and papers to his house. These other sheets were lying on my desk, day in and day out, and he saw them.

Q. The- were lying on your desk, day in and day out, when?

A. After the books and papers which I have testified were taken to his house, and then this paper was in use, as the cases were being settled and daily entries were made in it during that time according to their several dates, of which Mr. Cummings had full knowledge in every respect.

Q. I shall have to be a little more direct. Will you state whether or not this paper was in existence on the 6th day of September, 1886, when this transaction was made?

A. It was.

Q. Then when he was asking you for information upon the subject, such as justified you in handing him these public docu-
289 ments to advise himself as to the state of the matter, why was it that you did not hand him this paper?

A. As I have said before, at that time I am not certain that that paper was in existence.

Q. You are not certain that this paper was in existence on the 6th day of September, 1886?

A. I am; but he took the books and papers to his house some three weeks prior to that, at least.

Q. But before you consummated that trade with him did you or did you not have this paper?

A. I did.

Q. Was he not, up to the very point of accepting your check, still considering whether he would accept it or not?

A. I do not know. You can ask him about that.

Q. What took place on the morning of the day when the transaction was consummated?

A. He came into the office and said he had been thinking it over, and if I thought it was best for him he would take $15,000. I said, I have no advice to give you: that is more than I think I ought to pay you, but to end the matter I will do it. He then said he would take the check.

Q. Where was this paper when that conversation took place?

A. It was in the office.

Q. Had you ever handed it to him?

A. I am very confident I had. I cannot say positively.

Q. Why, Mr. Baker, you have sworn you did not show it to him until the next day.

A. I have not. I have sworn that I did show it to him the next day, but not that I did not show it to him before that
290 time. This paper was in use, as the entries on it will show, for several days prior to that time. It was there in the office, open

to his inspection as it was to mine, only that I made the entries in it and he did not. That is all there is of it. When that paper was prepared—the exact date—I cannot tell, but it was prepared prior to any date there is on it, whatever that may be.

Q. Will you please state now whether you are prepared to say that you ever handed that paper to Mr. Cummings or called his attention to it prior to the 7th day of September, 1866?

A. I have no doubt on that point whatever. What transpired as to any individual paper in the office on any given date I cannot tell you, but I have not a particle of doubt but that Mr. Cummings prepared that first page of entries with me from the documents, and that was prepared prior to any date therein of the remittance of a check.

Mr. CLAUGHTON: I want to put on the record an objection to the witness persisting in giving his doubts and opinions in answer to my questions as to facts.

Mr. JOHNSON: The witness has promptly, fully, and explicitly answered your questions, as the record will show.

Mr. CLAUGHTON: You have nothing to do with this witness now.

Mr. JOHNSON: I have the right to make any objection now, and have the right to put it upon the record.

Mr. CLAUGHTON: I have tried my best to get the witness to answer the questions.

Mr. JOHNSON: I say that his answers are full and complete, and that is the reason you object to them.

291 Mr. CLAUGHTON: That is an impertinent interference on your part. I am examining this witness in the performance of my professional duty.

Mr. JOHNSON: And I am here also in that capacity, and I want the court to know that I am here.

Mr. CLAUGHTON: When I ask you a question again, I request you to make an answer and not a speech.

Q. Are you prepared to say that before the assignment of the inspector cases was made to you by Mr. Cummings you placed in his hands or called his attention in any way to this document about which I am now examining you, H. M. B. No. 3?

A. In my own mind I have no doubt I did so do.

Q. Do you recollect that you did so do?

A. I have no doubt that I did it. I do not remember.

Q. Do you recollect that you did so do?

A. I have no doubt of it.

Q. Do you recollect that you did so do?

A. I do not remember the day or the hour, but I have no doubt of it.

Q. Why have you no doubt of it?

A. Simply because it was in the natural order of things. I had nothing to conceal and attempted to conceal nothing.

Q. Mr. Baker, you have in your testimony distinctly sworn that you put this paper in his hands the next day, when you were about going from the city, and at that time he had the paper which, if

he had had any judgment or discretion, would have given him the information in respect to these fees. Now, with this testimony
292 before you, are you prepared to say that you have no doubt the paper was placed in his hands before the transaction was made?

A. I did not use the language of the question in my testimony, but I repeat my answer just given.

(And thereupon counsel for the complainant read from the testimony-in-chief of this witness on page 16 relative to the matter just inquired into.)

By Mr. CLAUGHTON:

Q. You will now observe from your testimony that you left it with him on the 7th, and from that paper, during your absence, he could have ascertained all about the amount of these claims that had been appropriated for at the time of the settlement. With your attention called to that testimony, are you prepared to say that this paper which you have testified you gave to him on the 7th had been submitted to him prior to that time?

A. I testify exactly as heretofore.

Q. Then you decline to answer that question?

A. I do not.

Q. Will you please answer it?

A. I have answered it.

Q. You will observe from your testimony that you left that with him on the 7th, and from that paper, during your absence, he could have ascertained all about the amount of these claims that had been appropriated for at the time of the settlement. With your attention called to that testimony, are you prepared to say that this paper which you have testified you gave him on the 7th had been submitted to him prior to that time?

293 A. I have no doubt of it. I stated in my testimony-in-chief the 7th, because that was a specific date upon which I knew that I had done a given thing, for the reasons and circumstances there given, and that it remained in his possession until such another given date for the reasons and circumstances there given, and that it was in his possession on the intermediate date for the reasons there given and from the entries on the paper itself.

Q. Have you any recollection that this paper was in his possession prior to these dates?

A. My remembrance is that I compared that paper with him from documents 70 and 225. That was not an unusual occurrence in the matters of the firm. That I did compare this identical paper with him I cannot swear definitely and positively, because it was so long ago, and as it was not an unusual occurrence I did not charge my mind with it and cannot tell you, but I have no doubt individually upon that subject.

Q. If this paper was handed to him or shown to him prior to the transaction—I mean the assignment—what necessity would there have been for you to hand him the printed documents with the checks which you say were upon them when handed to him?

A. He did not have that paper to take to his residence. I do not know whether it was in existence at the time he took the books and papers to his residence; but even had it been in existence and had it been given to him it would have been appropriate to have
294 given him the documents, that he might have checked that paper off with the documents.

Q. For what purpose?

A. To see that it was correctly done.

Q. The purpose of the documents with the checks upon it was to see which of these cases belong to Cummings & Baker?

A. Yes, sir; and also for the purpose of showing the cases in which Cummings & Baker had less than the ordinary fee.

Q. Do the printed documents show which of the Cummings & Baker cases had less than the ordinary fees?

A. Not without the marks, but with the marks it does.

Q. How do the marks affect that?

A. It is shown by blue pencil marks as I had it taken from the fee agreements.

Q. You mean to say that the blue pencil marks indicated the cases in which the fees were less than 25 per cent.?

A. Yes, sir.

Q. And that same information is in this paper?

A. It is, by calculation. I do not know whether it is marked on the margin or otherwise. I do not remember about that now. Of course a calculation would show.

Q. Sometimes it was marked on the paper?

A. Yes.

Q. Then this paper that you say that you handed to him on the 7th is really, in respect to the names and the amount of fees in each respective case, a mere copy of the books with the checks on the books?

A. It was intended to be.

Q. Is it?

295 A. I presume it is. So far as I know, it is.

Q. Is there anything else on it that is not on the book with these checks?

A. Nothing except the entries as to the date of the remittance, the amount of the remittance, the number of the check, the date of the check, and the additional sheets showing the amounts due to other attorneys.

Q. Then the public documents do not show the amount of the checks?

A. Yes; they show that amount of the checks, unless there is some mistake in printing. Otherwise the documents would show exactly the same as the amount of the checks.

Q. Then, if I understand you correctly, the only difference between these public documents and this paper is that this paper is an extract from the public documents as to the Cummings and Baker matters, while the public documents have other matters besides the Cummings & Baker cases?

A. Yes.

Q. That is all?

A. Yes.

Q. How long before the first entry on this paper was made was it prepared?

A. I could not tell you.

Q. Can you approximate it?

A. I always intended to have a paper similar to that prepared in readiness for the first issue of drafts. It may have been done the night before or it may have been done two or three days before. Ordinarily it was only a short time before.

296 Q. To what first issue do you allude?

A. The issue of the first draft by the Treasury Department in payment of the claims.

Q. You think it was prepared how long before that?

A. It might have been the day before or it might have been a week before. I do not know about that. It was ordinarily just before I expected the Treasury Department would issue some drafts in payment.

Q. Would you not naturally prepare such a paper very soon after Congress made the appropriation?

A. No; not necessarily.

Q. My question was ordinarily.

A. Ordinarily it would be done in season for the use for which it was intended and not much before.

Q. Do you remember at what time this appropriation was made?

A. The statutes will show. I do not remember the date.

Q. Now I will ask you a few questions about the conduct of these negotiations. You have testified that your acted fairly and squarely with Mr. Cummings in the matter of trade. Is that what you do testify to?

A. Yes, sir; I am willing to testify to that.

Q. Do you think you dealt as fairly with him as you would have don- with anybody else with whom you were making a trade?

A. Yes, sir.

Q. You intended to give him all of the facts from which an intelligent gentleman would be able to come to a conclusion as to whether or not the trade was to his advantage?

A. I intended he should have that, and think he did. He was not in ignorance on the subject.

297 Q. If I understand you correctly, you did not think it was incumbent upon you to give him any advice?

A. I declined to give him advice.

Q. You did not think it was incumbent upon you to do anything more than to place in his possession such facts as would give him the means of investigating and deciding upon his own judgment whether or not the assignment should be made?

A. That was what he had. He had everything, so far as I know, upon which I should have acted to have made the calculation, which I suppose he did.

Q. You regarded it as a matter of trade, in which it was the business of each man to look after his own interests?

A. Unquestionably; just as in every other trade.

Q. Do you know whether he ever received anything from the H. D. Cook matter?

A. I do not.

Q. He never reported to you that he had received anything?

A. He never did. I knew that he had funds belonging to the assigned bank, but whether he ever devoted any of them to his own uses I do not know.

Q. In reference to this document marked H. M. B. No. 7, is this one of the papers that you handed to Mr. Cummings to advise him of the condition of the business?

A. Yes; but I think possibly these blank sheets have been *have been* put on this as a kind of a cover to this paper.

Q. What does that paper show?

A. This paper shows the name of the client and, in general, the period for which arrears of salary were claimed for the
298 client. For instance, here is the first name, Harry J. Ashmore, Burlington, New Jersey, from August 1st, 1875, to November 30, 1875. Burlington, N. J., represented his place of service, and the dates represented the period of the service for which the claim was made.

Q. Does that show how much was due to him?

A. No; this does not. His salary, ordinarily, was taken from the Treasury Registers, and the difference between that salary and the legal salary, as specified in the statutes, would be the amount due.

Q. Then, in order to make this paper of any assistance to Mr. Cummings, it would be necessary for him to search the Treasury records?

A. No, sir; I said the Treasury Registers.

Q. That is a record, is it not?

A. It is a public document, the same as the Blue Book.

Q. You may change it to Treasury Register and then answer the question.

A. It was one of the links necessary to complete the computation.

Q. Had you in your possession anything that supplied that link?

A. I had not, unless a case had been adjudicated, as shown in documents 70 and 225.

Q. Then all of these cases in document H. M. B. No. 7 that had been adjudicated are reported in printed documents as adjudicated cases?

A. Yes; from time to time.

299 Q. Only a portion of the names in printed documents 70 and 225 will be found in Exhibit No. 7. For the plaintiff to have been advised what was due to these various claimants he would have had to make a search somewhere else to ascertain those facts?

A. If I had been intending to make a proper computation I should have checked off the names in document- No. 70 and No. 225 so far as contained in them; then the other cases would require a computation for the purpose of ascertaining the difference

between the amount it was shown by the Treasury Register they received and $3 a day, to which they were entitled.

Q. And in respect to those cases you had no other information than these papers and these documents give?

A. Those were all the records I had.

Q. You had no other information?

A. No, sir; no other information.

Q. Your familiarity with the cases did not give you any additional information?

A. No, sir; they were filed in that way. When they were passing the accounting officer I then went over the figures in the case as they were made in the departments and verified each case as it was being passed, and if the allowance was not made for the whole time, or if it was made at different rates from those that I thought it should be made for, I made an investigation in the case as it went along. In that way, with a few exceptions, the amounts found due by the accounting officers of the Treasury were accurate and correct

300 and satisfactory to myself as attorney.

Q. Can you look at this paper handed to him on the 7th day of September, and from your examination of that can you tell what amount has already been appropriated for and the fees belonging to Cummings and Baker in those cases?

A. Not from paper No. 7 alone, but from paper No. 7 and documents No. 70 and 225 and the Treasury Registers and fee agreements, a list of which was given to him, of the cases where, so far as my examination showed, the fees were less than 25 per cent.——

Q. I am talking about this paper only.

A. From these papers it could easily be done.

Q. Please look at Exhibit H. M. B. No. 3. You have testified, I believe, that from this paper, by adding up certain columns, he could have advised himself as to exactly the amount of the claims that had already been appropriated for on the 6th day of September, 1886?

A. I see they are added up here. They are my figures, and I presume they are right.

Q. Are those your figures?

A. I think they are my figures.

Q. What do they add up?

A One page foots up $2,351.46; another, $6,342.16; another, $5,325.65; another, $7,570.79; another, $5,594.78, and another, $5,792.67.

Q. What do they aggregate?

A. $32,977.51.

Q. Can you tell from that statement how much was due to

301 other attorneys?

A. These sheets show.

Q. I want you, Mr. Baker, if you can, to state it, and I want to get it in the record from your testimony.

A. I cannot give it in any way except from this sheet—$1,488.81.

Q. That left due, then, to Cummings and Baker how much?

A. $31,488.70; but that does not cover any of the other expenses of the firm, which were large in a great many directions.

Q. I am talking about the fees now.

A. After the trade the expenses relating to these cases were paid by myself individually.

Q. It now appears from this paper that $31,488.70 was the amount of the fees. What proportion of that had already been collected by you?

A. When?

Q. At the time of the trade.

A. I do not know.

Q. Is there any way by which you can ascertain that?

A. The receipts would show by there dates.

Q. What had not been collected by you were in the shape of issued drafts, ready to be delivered upon the presentation of the power of attorney, as I understand it. Is that so?

A. That is so.

Call is here made upon the defendant for a list of fees collected by him on the partnership account for and during the twelve months prior to the dissolution other than the inspector cases, which he claimes were entirely has own.

302 Call is also here made upon the defendant to file a schedule of cases in his hands at the time of the dissolution of the partnership with the complainant or in which said defendant had an interest secured or acquired during said partnership, the nature and condition of each of said cases, where filed, when, the amount claimed, the amount allowed, the fees contracted for or charged in such cases.

By Mr. CLAUGHTON:

Q. I understand that you claim, Mr. Baker, that you had entire charge of these inspector cases and did all the work in them?

A. No, sir; I have never claimed it.

Q. State exactly what you do claim in that respect.

A. I claim that the inspector cases were discovered by myself, and that I explained them to the complainant; that we proceeded with them jointly until 1886, and he received one-half of the fees in full up to that time. During that time the greater portion of the work was done by myself, but he assisted me from time to time, largely in manual ways, when we had duplicate copies of letters, &c., to prepare, and sometimes in filling up blank powers of attorney and preparing papers from copies which I had given him, frequently on a typewriter, and generally in looking after them altogether during my absence from the city, and sufficient at all times to keep him entirely posted not only with the nature of the cases, but the mode of settlement and the general practice in connection with them.

303 Q. Then you do not claim that you did most of the work in respect of those cases?

A. I said that I did claim that I did most of the work.

Q. Will you please state whether or not, as a matter of fact, the general management of these claims was committed to you?

A. I do not know that anything was committed to anybody in the firm. As a matter of fact, I did generally *did* manage these cases.

Q. You had a more intimate knowledge in respect to them because you did generally manage them, I suppose?

A. Because I did the larger portion of the work.

HENRY M. BAKER.

Subscribed and sworn to before me this 27th day of Jan'y, 1892.

WM. HERBERT SMITH,
Examiner in Chancery.

The further taking of these depositions was thereupon adjourned until Tuesday, Jan. 10, 1893, at 1 o'clock p. m.

WASHINGTON, D. C., *Jan.* 10, 1892—1 o'clock p. m.

Met pursuant to adjournment.

Present on behalf of the complainant, Mr. Mackey and Mr. Claughton.

Present on behalf of the defendant, Mr. Johnson.

And thereupon, in response to call of counsel for the complainant made at the last session for certain papers, the defendant here produces, in response to said call, the fol-owing papers, which
304 are offered in evidence and marked H. M. B. Nos. 8 and 9.

And thereupon the counsel for the defendant offered in evidence a press copy of a certain letter written in reply to Complainant's Exhibit "Thoughts in Mind," and also a written copy from said press copy, which said letters are marked Exhibits H. M. B. Nos. 10 and 11.

The introduction of the above-mentioned papers in evidence is objected to by counsel for the complainant as being incompetent, immaterial and irrevelant, and upon the ground that the defendant cannot make evidence for himself.

And thereupon the defendant, by *its* counsel, introduced in evidence a certain letter bearing date August 13, 1889, addressed H. S. Cummings, Esq., and the same is filed herewith, marked Exhibit H. M. B. No. 12.

The introduction of the above-mentioned paper in evidence is objected to by counsel for the complainants as being incompetent, immaterial and irrelevant, and upon the ground that the defendant cannot make evidence for himself.

And thereupon the defendant announced *its* testimony closed.

305 *Surrebuttal Testimony.*

Counsel for the defendant thereupon offered in evidence a letter dated October 5, 1889, from H. S. Cummings to H. M. Baker.

Counsel for the complainant objected to the introduction of said letter in evidence because said letter is not responsive to anything

brought out in the testimony in rebuttal and because the same, if relevant at all, should have been offered by the defendant at the proper time.

Counsel for the complainant also objected to the said letter as being irrelevant and immaterial to any issue in this cause, and shows upon its face an effort upon the part of the writer, the complainant herein, to compromise the case, and for that reason alone, if for no other, it is inadmissible.

Said letter is in the words and figures following, to wit:

306 Horace S. Cummings, counsellor-at-law, Washington, D. C.,
No. 1411 F street N. W.

A. M. Baker. Oct. 5, '89.

DEAR SIR: Mackey met me and asked me some questions, as coming from you, about my idea of the status of the last time cases and insurance cases which had been adjudicated but not appropriated for. I will say that I consider that you have an equal interest in them as myself, and if I collect them I am legally bound to account to you for the fees which may come to me in the absence of any agreement otherwise—that is, legal and law.

I consider you have an equal interest in the Huestis case and *and* "State of Maine" case, if no agreement to the contrary is reached.

I believe the insurance cases will be paid this session if we can believe anything of the promises of the Republican members who are likely to be chairman of the Appropriation Committee. Mackey also asked about some case which I had once but dropped, and Vail was in it. I presume you mean the Tunstall case. That case I had presented and dropped before we had any firm relations. Even before you left the Treasury I believed the case rotten; Cooper was att'y: afterwards in it, but Parish worked him out.

I told Cooper what I had heard about the case, and Cooper said, I can make Parish pay your case in court, and I said, Go ahead. He afterwards asked me if I would give a stipulation to dismiss the
suit I had against Parish if he, Parish, would pay the prin-
307 cipal. I said yes and gave the stipulation. Cooper paid me $450 in about 30 days and the balance about 8 or 10 months after. How he got it I do not know, only that I gave him 50 per cent., and I never had any fee in the case — Tunstall whatever.

Mackey says you think any charge of one per cent. of claims exorbitant in the power of att'y matter. You say it took about 3 half hours. You are mistaken. It was a week before I could make an impression on him. You know how he put me off; how I took a big bundle of letters over to him to show the relations with our clients; how I went to Fairchild, refused but finally agreed to leave it to Maynard; how I went to Maynard's house. I made the cases my cases, as I honestly believed they were. One per cent. too much? Why? Why, I was offered ⅓ of a good fee to get a man's drafts for him that very year, and I tried it and Maynard refused it, when he said it was another attorney's case, and said what he had done was for personal reasons and not as a matter of business. Three times I

pleaded for you. How much did it cost you to get your fees in those cases where the drafts got away from you? Didn't it cost far more than one per cent. of the claim? Took but little time, did it? The value of services depends on the results and not on hours; ¾ of what you collected subsequent to '86 was on powers and contracts gotten prior to that time. All you did was to write a simply letter of renewal of claim, back it up with the stereotyped affidavit of which I wrote scores, and the work was done. Was your service any the less valuable when you took a $500 fee for a few
308 minutes' work.

In order to be sure, I have stated a hypothetical case like the present one of draft matters to some half dozen practicing attorneys before the departments, and not one set as low a fee as I did.

You would not have done it so cheap if a stranger or client had asked you to do the job.

Baker, I have made you a fair, honorable proposition, for I am not going to have any blame attached to my side.

Yours truly, H. S. CUMMINGS.

P. S.—I had an inquiry short time ago about Medical Lake lands. I simply said they were not for sale. Was I right?

309 DISTRICT OF COLUMBIA, *ss:*

I, William Herbert Smith, an examiner in chancery in and for the city of Washington, District of Columbia, do hereby certify that the foregoing depositions were taken down by me in short-hand at the time and place mentioned in the caption thereof from the oral statements of said witnesses, which said witnesses were by me first duly sworn to testify the truth, the whole truth, and nothing but the truth; that said depositions were thereupon read over by said witnesses and subscribed to by them in my presence.

I further certify that I am not of counsel in said cause or otherwise interested in the result of said suit.

WILLIAM HERBERT SMITH,
Examiner in Chancery.

Fees, 60.00, paid by def't.
WM. HERBERT SMITH.

310 EXHIBIT H. M. B. No. 1.

49TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { EX. DOC. No. 70.

LIST OF CLAIMS ALLOWED BY ACCOUNTING OFFICERS OF THE TREASURY.

LETTER

FROM

THE SECRETARY OF THE TREASURY,

TRANSMITTING

Schedules of claims allowed by the accounting officers, appropriations for which have been exhausted, or carried to the surplus fund.

FEBRUARY 12, 1886.—Referred to the Committee on Appropriations and ordered to be printed.

TREASURY DEPARTMENT, *February* 10, 1886.

SIR: I have the honor to transmit herewith, in compliance with section 2 of the act of July 7, 1884 (23 Stat., p. 254), schedules of claims allowed by the several accounting officers of the Treasury Department under appropriations the balances of which have been exhausted, or carried to the surplus fund under the provisions of section 5 of the act of June 20, 1874 (18 Stat., p. 110), amounting to $1,426,675.36.

Respectfully, yours,

D. MANNING,
Secretary.

The SPEAKER OF THE HOUSE OF REPRESENTATIVES.

311 CLAIMS ALLOWED BY ACCOUNTING OFFICERS.

Reported by the First Auditor and Commissioner of Customs, &c.—Continued.

No. of certificate of claim.	Name of claimant.	Appropriation from which payable.	Fiscal year in which the expenditure was incurred.	Amount.
	TREASURY *Treasury* DEPARTMENT—Cont'd.			
	Claims—Continued.			
94807	Asa Larned	Expenses of collecting the revenue from customs prior to July 1, 1883.	1879–1881	$315 50
*a94807	Selden A. Jones	do	1877–1878	309 50
*a94807	Frank Granger	do	1876	78 00
*a94807	Lawrence T. Remer	do	1876	63 00
*a94807	H. S. Ballentine	do	1881	161 47
*a94807	Stephen H. Avery	do	1879–1880	197 73
*a94807	W. A. Woodward	do	1876–1878	474 03
*a94807	James Bills	do	1876–1877	261 09
*a94807	J. M. Jenks	do	1875, 1876	413 71
*a94807	Bela W. Jenks	do	1875, 1876	432 00
*a94807	Herbert C. Sanborn †	do	1879–1881	337 16
*a94766	S. B. Dickerson	do	1875, 1876	104 00
*a94766	Ezra S. Hamilton	do	1875–1880	1,253 80
*a94766	Benj. D. Giff rd	do	1880, 1881	896 52
*a94766	Vinal F. Hatch	do	1878, 1881	2,379 23
*a94766	S. S. Baker	do	1880–1881	421 45
*a94766	Simeon Atwood	do	1880–1881	492 42
*a94766	James Gifford	do	1880, 1881	279 50
				15,473 85
	Total			18,791 93

[* Check-mark in copy.] [† Check-mark in blue in copy.]

a Difference between amount paid and legal compensation fixed by sections 2733 and 2738, Revised Statutes.

Recapitulation of Claims Allowed by the First Auditor and Commissioner of Customs.

Collecting revenue from customs prior to July 1, 1883	$15,473 85
Debentures or drawbacks, bounties or allowances prior to July 1, 1883	236 42
Repayment to importers excess of deposits prior to July 1, 1883	39
Expenses of revenue-cutter service, 1883 and prior years	29 10
Life-saving Service, 1883 and prior years	17 95
Supplies of light-houses, 1883 and prior years	5 31
Repairs an- incidental expenses of light-houses, 1883 and prior years	2 55
Expenses of *boa*yage, 1883 and prior years	1,785 60
Repairs and preservation of public buildings, 1883 and prior years	205 21
Heating apparatus for public buildings, 1884	967 80
Heating apparatus for public buildings, 1883 and prior years	58 20
Furniture and repairs of same for public buildings, 1883 and prior years	9 55
Total	$18,791 93

312 *Reported by the First Auditor and Commissioner of Customs under Section 2, Act July 7, 1884 (23 Stat., p. 254).*

No. of certificate or claim.	Name of claimant.	Appropriation from which payable.	Fiscal year in which the expenditure was incurred.	Amount.
	TREASURY DEPARTMENT.			
	Claims.			
*a*17626	Samuel I. Pope & Co	Heating apparatus for public buildings, 1884.	1884	$881 25
*b*18186	C. W. Meikel & Co	do	1884	3 75
*b*18712	Linning & Jackson	do	1884	82 80
				967 80
*c*17725	Central Pacific R. R. Co	Heating apparatus for public buildings, 1883 and prior years.	1875	8 40
*d*17137	Eagle machine works, of Indianapolis, Ind.	do	1883	49 80
				58 20
*e*40904	Henry W. Hoffman, late collector of customs.	Debentures or drawbacks, bounties or allowances, prior to July 1, 1883.	1866	236 42
*e*43633	do	Repayment to importers excess of deposits, prior to July 1, 1883.	1866	39
*c*24168	do	Expenses of buoyage, 1883 and prior years.	1866	1,785 60
*f*91882	H. Greeley Knowles	Repairs and incidental expenses of light-houses, 1883 and prior years.	1881	2 55
*f*18438	Inter-Ocean Publishing Company	Supplies of light-houses, 1883 and prior years.	1883	5 31
*g*18039	George H. Hall	Life-saving Service, 1883 and prior years.	1874–1882	8 75
*h*18878	J. W. Etheridge	do	1882, 1883	9 20
				17 95
*i*18044	Steam-tug Water Witch	Expenses of the revenue-cutter service, 1883 and prior years.	1883	25 00
*j*18076	Nicholas J. Kearney	do	1879	4 10
				29 10
*d*18075	John Lang & Co	Repairs and preservation of public buildings, 1883 and prior years.	1881–1883	116 20
*k*18187	C. F. Scott	do	1882, 1883	62 35
*b*18715	William M. Winchester	do	1881, 1882	26 66
				205 21
*b*18275	C. W. Meikel & Co	Furniture and repairs of same for public buildings, 1883 and prior years.	1883	9 55
*d*18075	John Lang & Co	Expenses of collecting the revenue from customs prior to July 1, 1883.	1881–1883	14 50
*l*18780	Edward Ludecke	do	1882, 1883	162 00
* *m*92207	William Williams	do	1878–1881	2,019 92
* *m*94807	David D. O'Dell	do	1876–1881	3,444 14
* *m*94807	John M. Robertson	do	1880, 1881	557 13
* *m*94807	John T. Howard	do	1881	64 30
* *m*94807	Joseph Davis	do	1881	64 30
* *m*94807	E. S. Petit	do	1878–1881	277 54

[* Check-mark in copy.]

a Work and material.
b Repairs.
c Storage.
d Material and labor.
e To be applied to balances due from him, involving no expenditure of money from the Treasury.
f Advertising.
g Use and occupation of land.
h Freight.
i Towing.
j Traveling expenses.
k Telephone.
l Salary as watchman, Alaska.
m Difference between amount paid and legal compensation fixed by sections 2733 and 2738, Revised Statutes.

313 *Summary of Claims.*

State Department:	
Foreign intercourse	$1,537 47
Treasury Department:	
Internal revenue	44,819 18
Customs	18,791 93
Miscellaneous	3,631 69
	67,242 80
War Department:	
Second Auditor's accounts, army	460,798 06
Third Auditor's accounts, army	283,976 65
	744,774 71
Navy Department:	
Naval Observatory	499 80
Fourth Auditor's accounts, navy	183,270 99
	183,770 79
Interior Department:	
Civil	136 44
Public lands	51,812 21
Indians	25,941 74
Pensions	62 36
	77,952 75
Post Office Department:	
Postal service	324,411 85
Department of Justice:	
Judicial expenses	26,984 99
Total	1,426,675 36

314 EXHIBIT H. M. B. No. 2.

49TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { EX. DOC. No. 225.

SUPPLEMENTAL LIST OF CLAIMS ALLOWED BY THE ACCOUNTING OFFICERS OF THE TREASURY.

LETTER

FROM THE

ACTING SECRETARY OF THE TREASURY,

TRANSMITTING,

In compliance with a resolution of the House of Representatives, supplemental lists of claims allowed under appropriations which are exhausted or the balances carried to the surplus fund.

MAY 8, 1886.—Referred to the Committee on Appropriations and ordered to be printed.

TREASURY DEPARTMENT, *May 6*, 1886.

SIR: In compliance with a resolution of the House of Representatives of April 15, 1886—

That the Secretary of the Treasury be requested to transmit to the House a schedule of all claims allowed by the accounting officers of the Treasury under appropriations the balances of which have been exhausted or carried to the surplus fund under the provisions of section 5 of the act approved June 20, 1874, since the allowance of those embraced in House Ex. Doc. No. 70—

I have the honor to transmit herewith lists of the claims referred to, amounting to $700,197.18.

Respectfully, yours,

C. S. FAIRCHILD,
Acting Secretary.

The SPEAKER OF THE HOUSE OF REPRESENTATIVES.

315 *Reported by the First Auditor and Commissioner of Customs, under Section 2, Act July 7, 1884 (23 Stat., p. 254).*

No. of certificate or claim.	Name of claimant.	Appropriation from which payable.	Fiscal year in which the expenditure was incurred.	Amount.
	TREASURY DEPARTMENT.			
	Claims.			
*a*94826	Frank Gross	Lighting and buoying of the Mississippi, Missouri, and Ohio rivers, 1883 and prior years.	1883	$15 25
*b*19344	Northern Pacific R. R. Co	Marine Hospital Service, prior to July 1, 1883.	1883	46
*c*18924	Otto Andreas	Expenses of collecting the revenue from customs, prior to July 1, 1883.	1878, 1879	60 84
*d*19231	E. T. Bayard	do	1882	3 26
* *e*94903	J. A. Riopelle	do	1876, 1881	5,452 36
* *e*94903	Chas. E. Bury	do	1879, 1881	392 50
* *e*94903	Benjamin Balger	do	1877, 1881	2,672 67
* *e*94903	Frank Hesse	do	1879, 1881	732 03
* *e*94903	David E. Johnson	do	1878, 1879, 1880, 1881	1,849 61
* *e*94903	John Wood	do	1879, 1881	1,645 36
* *e*94903	Rudolph Kern	do	1879, 1881	346 30
* *e*94903	John S. Smith	do	1879, 1881	1,461 00
* *e*94903	Daniel Cole	do	1879, 1881	675 04
* *e*94903	J. B. Hinchman	do	1879, 1881	362 70
* *e*94903	William L. Damon	do	1880, 1881	183 50
* *e*94903	George King	do	1879, 1881	674 64
* *e*94903	John E. Nellis	do	1880, 1881	927 77
* *e*94903	Wiber Howard	do	1880, 1881	183 50
* *e*94903	Orson B. Curtis	do	1880, 1881	140 50
* *e*94903	Joseph H. Riggs	do	1875	53 00
* *e*94903	Louis Cicotte	do	1876, 1881	5,452 36
* *e*94903	C. R. Dannals	do	1879, 1881	132 90
* *e*94903	R. W. Beach	do	1879, 1881	300 55
* *e*94903	David E. Morgan	do	1879, 1881	363 30
* *e*94903	Otis Bradford	do	1879, 1881	392 50
* *e*94903	D. Milo Heath	do	1879, 1881	1,461 00
* *e*94903	Virgil W. McGraw	do	1879, 1881	392 50
* *e*94903	Lyman Stiles	do	1877, 1879	1,710 00
* *e*94903	Archibald Campan	do	1876, 1878, 1879, 1881	3,748 53
* *e*94903	James L. Kellogg	do	1879, 1881	392 50
* *e*94903	W. H. Stoddard	do	1876, 1881	4,719 70
* *e*94903	George W. Coomer	do	1879, 1880	1,062 63
* *e*94903	W. U. Thayer	do	1879, 1881	533 49
* *e*94903	John Higgs	do	1879, 1881	392 50
* *e*94903	William F. Brown	do	1878, 1881	1,599 37
*e*95009	W. M. Cherry *	do	1876, 1881	2,426 39
* *e*95009	R. A. Bensell	do	1877, 1879	344 00
* *e*95009	J. Q. A. Lothrop	do	1880, 1881	180 50
*e*95009	Mrs. Nellie Atchison *	do	1880, 1881	553 00
* *e*95009	Stephen Sharpe	do	1878, 1881	1,560 04
* *e*95009	Ethan Hammond	do	1876, 1881	831 00
*e*95009	Henry W. Pratt *	do	1878, 1881	1,046 55
* *e*95009	W. A. Forrester	do	1874, 1881	2,691 19
*e*95081	Martin Ranney *	do	1878, 1881	686 10
* *e*95081	William K. Beisel †	do	1879, 1881	4,720 01
* *e*95081	Silas Dixon	do	1876, 1881	3,792 24
* *e*95081	Alexander Maxwell	do	1881	682 78
* *e*95081	P. H. Ricker	do	1881	682 78
* *e*95081	Jacob L. Wallace	do	1876, 1877	1,365 00
* *e*95255	Thomas E. Scott	do	1874, 1876	1,131 16
*e*95255	Gustavus Smith *	do	1880, 1881	620 07
* *e*95255	James G. Waugh	do	1878, 1880	680 89
* *e*95254	Hiram M. Witherell	do	1876, 1877	407 28
* *e*95254	James Mitchell	do	1877, 1881	1,230 46
* *e*95254	Reuben Barton	do	1879, 1881	423 00
* *e*95254	Edwin B. Low	do	1881	47 70

[* Check-mark in copy.] [† Check-mark in blue in copy.]

a Services as light-house keeper at Whitney's, No. 3, in May and June, 1883.
b Transportation furnished Treasury Department in August and September, 1882.
c Excess of deposit on account of merchant appraiser in 1878 and 1879.
d Services as boatman in July, 1881.
e Additional compensation as inspector of customs under sections 2733 and 2738 R. S. (See Adams *vs.* U. S. and Bradford *vs.* U. S., 20 Court of Claims, 115.)

316 *Reported by the First Auditor and Commissioner of Customs, &c.*—Continued.

No. of certificate or claim.	Name of claimant.	Appropriation from which payable.	Fiscal year in which the expenditure was incurred.	Amount.
	TREASURY DEPARTMENT—Cont'd.			
	Claims—Continued.			
*a*95254	Samuel Comer	Expenses of collecting the revenue from customs prior to July 1, 1883.	1876, 1878	$877 70
* *a*95254	John Albert Ladue	do	1876	276 00
* *a*95254	Herrick E. Warren	do	1875, 1881	1,535 25
* *a*95254	Charles Deal †	do	1876, 1881	1,347 46
* *a*95254	P. H. Shield	do	1874, 1881	1,305 45
* *a*95254	Joseph Hardy	do	1876	703 10
* *a*95254	Ferd. W. Gaptill	do	1876, 1881	3,606 09
* *a*95254	Erastus S. Mead	do	1880	102 00
* *a*95254	Stoughton D. Mix	do	1878, 1881	1,462 70
* *a*95254	Cornelius Bosworth	do	1874, 1881	1,723 41
* *a*95254	D. W. Shurtliff	do	1877, 1881	1,218 03
* *a*95532	Virgil A. Crawford	do	1879, 1881	1,521 38
* *a*95532	Jeremiah Abbott	do	1876, 1881	3,771 47
* *a*95532	Israel B. Abbott	do	1876, 1878	1,698 50
* *a*95532	Homer W. Styron	do	1876, 1881	4,276 64
*a*95532	Ebenezer Campbell *	do	1876, 1881	1,011 50
* *a*95532	Walter Gray	do	1879, 1880	198 00
* *a*95532	Almon L. Parmerter	do	1880	166 44
* *a*95532	Asa Fish	do	1876, 1881	4,180 83
* *a*95532	Levi Trundy	do	1879, 1881	1,657 93
* *a*95532	George B Burnet	do	1877, 1881	3,244 42
* *a*95532	Harry Griswold	do	1876, 1881	3,138 92
* *a*95532	James L. Mallory	do	1876, 1881	3,697 23
* *a*95532	Charles Luling	do	1876, 1877	977 15
*a*95532	Julius R. Morris	do	1876, 1879	1,623 80
* *a*95532	William T. Hopper *	do	1879, 1881	1,326 33
*a*95532	William H. Rees	do	1875, 1878	408 40
* *a*95776	John W. Norton	do	1880, 1881	186 00
* *a*95776	John Combs	do	1879, 1881	1,082 60
* *a*95776	Abner Reed	do	1877, 1879	1,280 00
* *a*95776	F. M. Noble	do	1877, 1878	1,458 50
* *a*95776	Fred. Hebard	do	1878, 1881	1,929 25
* *a*95776	Elman Tyler	do	1876, 1881	3,287 75
* *a*95776	D. O. De Wolfe	do	1876, 1881	3,287 75
* *a*95776	J. L. Cline	do	1876, 1879	1,998 40
* *a*94776	Robert H. Percy †	do	1879, 1881	1,189 35
* *a*95776	Jesse Babcock	do	1877, 1880	1,121 35
* *a*95776	T. O. Peck	do	1876, 1881	3,389 75
* *a*95776	John D. Flint †	do	1876, 1877	1,047 00
				135,936 39
*b*19560	Jesse Spaulding	Furniture and repairs of same for public building, 1883 and prior years.	1883	4 86
*c*19540	Herman Martens	do	1883	5 25
				10 11
*d*19546	Thomas Brown	Furniture and repairs of same for public buildings, 1884.	1884	170 20
	Total			136,132 41

[* Check-mark in copy.] [† Check-mark in blue in copy.]

a Additional compensation as inspectors of customs under section 2733 and 2738, R. S. (See 20 Court of Claims, 115.)

b Money paid while collector of customs at Chicago for auctioneers' commissions and advertising sale of condemned furniture. No expenditure of money involved.

c Awnings and repairs to same, post office, Indianapolis.

d Gas fittings and labor furnished for post-office buildings in Philadelphia in March, 1884.

Recapitulation of Claims Allowed by the First Auditor and Commissioner of Customs.

Lighting and buoyage of the Mississippi, Missouri, and Ohio rivers, 1883 and prior years	$815 25
Marine Hospital Service prior to July 1, 1883	46
Expenses of collecting the revenue from customs prior to July 1, 1883	135,936 39
Furniture and repairs of same for public buildings, 1883 and prior years	10 11
Furniture and repairs of same for public buildings, 1884	170 20
Total	136,132 41

317 *Summary of Claims.*

State Department:	
Foreign intercourse	$2,220 49
Treasury Department:	
Customs	136,132 41
Internal revenue	11,564 08
Miscellaneous	995 68
	148,692 17
War Department:	
Second Auditor's accounts, army	235,157 86
Third Auditor's accounts, army	167,163 76
	402,321 62
Navy Department:	
Fourth Auditor's accounts, navy	80,891 92
Interior Department:	
Public-lands service	427 31
Miscellaneous, civil	338 83
Indians	1,224 88
	1,991 02
Post Office Department:	
Postal service	50,742 15
Department of Justice:	
Judicial expenses	13,337 81
Total	700,197 18

EXHIBIT H. M. B. No. 3.

No. 1.

Name.	Allowance.	Fee.	Remittance.	Date of remittance.	Remitted by check.	No. of check.	Date of check.
William Williams, Chas. F. Harrington, adm'r.	2,019 92	504 98	1,514 94	Aug. 30, 1886	1,514 94	337	Aug. 30, 1886
David D. O'Dell	3,444 14	861 04	2,583 10	Sept. 4, 1886	2,583 10	400	Sept. 4, 1886
John M. Robertson	557 13	139 28	417 85	" " "	417 85	401	" " "
John L. Howard	64 30	16 07	48 23	Sept. 2, 1886	48 23	379	Sept. 2, 1886
Joseph Davis	64 30	16 07	48 23	Aug. 31, 1886	48 23	341	Aug. 31, 1886
E. S. Petit	277 54	69 39	208 15	Aug. 30, 1886	208 15	336	Aug. 30, 1886
Asa Larned	315 50	78 88	236 62	" " "	236 62	335	" " "
Selden A. Jones	309 50	77 37	232 13	" " "	232 13	334	" " "
Frank Granger	78 00	19 50	58 50	Sept. 4, 1886	58 50	402	Sept. 4, 1886
Lawrence T. Remer	63 00	15 75	47 25	Sept. 13, '86	47 25	584	Sept. 13, 1886
H. S. Ballentine	161 47	40 37	121 10	Aug. 30, 1886	121 10	333	Aug. 30, 1886
Stephen H. Avery	197 73	49 43	148 30	Sept. 2, 1886	148 30	378	Sept. 2, 1886
W. A. Woodward	474 03	118 51	355 52	Aug. 31, 1886	355 52	340	Aug. 31, 1886
Emma Bills, adm'x, James Bills	261 00	65 25	195 75	Aug. 31, 1886	195 75	339	Aug. 31, 1886
J. M. Jenks	413 71	103 43	310 28	Aug. 31, 1886			
Bela W. Jenks	432 00	108 00	324 00	Sept. 6, 1886	310 28	408	Sept. 6, 1886
Herbert C. Sanborn, Henry Hart, adm'r.	337 16	42 14	295 02	Sept. 2, 1886	324 00	364	Sep. 2, 1886
S. B. Dickerson	104 00	26 00	78 00	Aug. 30, 1886	295 02	332	Aug. 30, 1886
				Sept. 2, 1886	78 00	365	Sept. 2, 1886
		2,351 46					

No. 2.

Ezra S. Hamilton	1,253 80	313 45	940 35	Sept. 6, 1886	940 35	409	Sept. 6, 1886
Benj. D. Gifford	896 52	224 13	672 39	Aug. 30, 1886	672 39	328	Aug. 30, 1886
Vinal F. Hatch	2,379 23	594 81	1,784 42	Sep. 3, 1886	1,784 42	390	Sept. 3, 1886
S. S. Baker	421 45	105 36	316 09	Aug. 30, 1886	316 09	329	Aug. 30, 1886
Simeon Atwood	492 42	123 10	369 32	Sept. 3, 1886	369 32	391	Sept. 3, 1886

James Gifford	279 50	69 88	209 62	Aug. 31, 1886	209 62	344	Aug. 30, 1886	
J. A. Riopelle	5,452 36	1,363 09	4,089 27	Sept. 9, 1886	4,089 27	427	Sept. 9, 1886	
Charles E. Bury	392 50	98 12	294 38	Sept. 2, 1886	294 38	380	Sept. 2, 1886	
Benjamin Bulger	3,672 67	918 17	2,754 50	" " "	2,754 50	381	" "	
Frank Hesse	732 03	183 01	549 02	Sept. 9, 1886	549 02	422	Sept. 9, 1886	
David E. Johnson	1,849 61	462 40	1,387 21	Sept. 6, 1886	1,387 21	411	Sept. 6, 1886	
John Wood	1,645 36	411 34	1,234 02	Sept. 2, 1886	1,234 02	382	Sept. 2, 1886	
Rudolph Kern	346 30	86 58	259 72	" 4, "	259 72	403	" 4, "	
John S. Smith	1,461 00	365 25	1,095 75	Sept. 3, 1886	1,095 75	396	" 3, "	
Daniel Cole	675 04	168 76	506 28	Sept. 1, 1886	506 28	347	Sept. 1, 1886	
J. B. Hinchman	362 70	90 68	272 02	" 2, 1886	272 02	383	" 2, "	
Wm. L. Damon, E. P. Rowley, adm'r	183 50	45 88	137 62	Oct. 2, 1886	137 62	532	Oct. 2, 1886	
George King	674 64	168 66	505 98	Sept. 2, 1886	505 98	366	Sept. 2, 1886	
		5,792 67						

320 No. 3.

John E. Nellis	927 77	231 94	695 83	Sept. 2, 1886	695 83	367	Sept. 2, 1886	
Wilber Howard	183 50	45 88	137 62	Sept. 1, 1886	137 62	363	Sept. 1, 1886	
Orson B. Curtis	160 50	40 12	120 38	" 2, "	120 38	384	Sept. 2, 1886	
Alida Riggs, widow of Joseph H. Riggs	53 00	13 25	39 75	Sept. 9, 1886	39 75	424	Sept. 9, 1886	
Louis Cicotte	5,452 36	1,363 09	4,089 27	Sept. 3, 1886	4,089 27	392	Sept. 3, 1886	
C. R. Dannals	132 90	33 22	99 68	Sept. 2, 1886	99 68	368	Sept. 2, 1886	
R. W. Beach	300 55	75 14	225 41	" " "	225 41	369	" " "	
David E. Morgan	363 30	90 82	272 48	" 4, "	272 48	404	Sept. 4, 1886	
Otis Bradford	392 50	98 12	294 38	Sept. 2, 1886	294 38	370	Sept. 2, 1886	
D. Milo Heath	1,461 00	365 25	1,095 75	" " "	1,095 75	371	" " "	
Frederick G. McGraw, adm'r Virgil W. McGraw	392 50	98 12	294 38	Oct. 11, 1886	294 38	538	Oct. 11, 1886	
Lyman Stiles	1,710 00	427 50	1,282 50	Sept. 2, 1886	1,282 50	385	Sept. 2, 1886	
Archibald Campan	3,748 53	937 13	2,811 40	" 6, "	2,811 40	412	Sept. 6, 1886	
James L. Kellogg	392 50	98 12	294 38	Sept. 4, 1886	294 38	405	Sept. 4, 1886	
W. H. Stoddard	4,719 70	1,179 93	3,539 77	Sept. 2, 1886	3,539 97	372	Sept. 2, 1886	
Geo. W. Coomer	1,062 63	265 66	796 97	" " "	796 97	373	" " "	
W. U. Thayer	533 49	133 37	400 12	" " "	400 12	374	" " "	
John Higgs	392 50	98 12	294 38	Sept. 1, 1886	294 38	348	Sept. 1, 1886	
		5,594 78						

Exhibit H. M. B. No. 3—Continued.

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No. 4.

Name.	Allowance.	Fee.	Remittance.	Date of remittance.	Remitted by check.	No. of check.	Date of check.
Wm. F. Brown	1,599 37	399 84	1,199 53	March 25, 1887	1,199 53	654	March 25, 1887
R. E. Bensell	344 00	86 00	258 00	Sept. 29—gave Baker's.	per. check	to Ad.	Ex. Co.; took
J. Q. A. Lothrop	180 50	45 12	135 38	Sept. 1, 1886	135 38	349	Sept. 1, 1886
S. J. Sharpe & Stephen Sharpe	1,560 04	390 01	1,170 03	Duplicate mailed Nov. 15, 1886. Sept. 29, '86	1,170 03	593	Sept. 29, '86
Ethan Hammond	831 00	207 75	623 25	Sept. 1, 1886	623 25	350	Sept. 1, 1886
W. A. Forrester	2,691 19	672 79	2,018 40	" " "	2,018 40	351	" " "
Wm. H. Beisel, 15	4,720 01	708 00	4,012 01	" " "	4,012 01	352	" " "
Silas Dixon, Andrew T. Donaldson & Harriet Dixon, adm'rs	3,792 24	948 06	2,844 18	Oct. 11, 1886	2,844 18	537	Oct. 11, 1886
Alexander Maxwell	682 78	170 70	512 08	Aug. 30, 1886	512 08	331	Aug. 30, 1886
P. H. Ricker	682 78	170 70	512 08	" " "	512 08	330	" " "
Jacob L. Wallace	1,365 00	341 25	1,023 75	Sept. 1, "	1,023 75	353	Sept. 1, 1880
Thomas E. Scott, C. B. F. Hinkley, adm'r	1,131 16	282 79	848 37	" 2, "	848 37	386	" 2, "
James E. Waugh	680 89	170 22	510 67	Sept. 29, '86	510 67	592	Sept. 29, '86
Hiram M. Witherill, Sarah M. Witherill, ex't'x	497 28	124 32	372 96	Oct. 4, 1886	372 96	595	Oct. 4, 1886
James Mitchell	1,230 46	276 76	953 70	Nov. 26, 1886	953 70	639	Nov. 26, 1886
Reuben Barton	423 00	100	323 00	Sept. 1, 1886	323 00	354	Sept. 1, 1886
Edwin B. Low	47 70	11 92	35 78	Sept. 15, '86	35 78	434	Sept. 15, 1886
Samuel Comer	877 70	219 42	658 28	Sept. 9, 1886	658 28	423	Sept. 9, 1886
		5,325 65					

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No. 5.

John A. Ladne, Jacob Parmester, adm'r	276 00	69 00	207 00	Oct. 9, 1886	207 00	604	Oct. 9, 1886
Herrick E. Warren	1,535 26	383 81	1,151 45	Sept. 6, 1886	1,151 45	413	Sept. 6, 1886
Charles Deal, 20	1,347 46	269 50	1,077 96	Sept. 1, 1886	1,077 96	355	Sept. 1, 1886
P. H. Shields	1,305 45	326 36	979 09	"	979 09	356	"

Joseph Handy, Lucy Handy, adm'x	703 10	175 77	527 33	Sept. 25, '86	527 33	447	Sept. 25, '86
Ferd. W. Guptell	3,606 09	901 52	2,704 57	Sept. 1, 1886	2,704 57	357	Sept. 1, 1886
Erastus S. Mead, Sarah A. Mead, widow	102 00	25 50	76 50	" 3, "	76 50	393	" 3, "
Stoughton D. Mix	1,462 70	365 68	1,097 02	Sept. 9, '86	1,097 02	426	Sept. 9, '86
Cornelius Bosworth	1,723 41	430 85	1,292 56	Sept. 9, 1886	1,292 56	424	Sept. 9, 1886
D. W. Shurtliff	1,218 03	304 51	913 52	Sept. 6, 1886	913 52	414	Sept. 6, 1886
Virgil A. Crawford	1,521 38	380 34	1,141 04	Aug. 31, 1886	1,141 04	342	Aug. 31, 1886
Jeremiah Abbott	3,771 47	942 87	2,828 60	Sept. 1, 1886	2,828 60	358	Sept. 1, 1886
Israel B. Abbott	1,698 50	424 62	1,273 88	Aug. 31, 1886	1,273 88	343	Aug. 31, 1886
Homer W. Styron	4,276 64	1,069 16	3,207 48	Sept. 15, '86	3,207 48	435	Sept. 15, '86
Almon L. Parmester	166 44	41 61	124 83	Sept. 6, 1886	124 83	415	Sept. 6, 1886
Asa Fish	4,180 83	1,045 21	3,135 62	Sept. 2, 1886	3,135 62	377	Sept. 2, 1886
Levi Lundy	1,657 93	414 48	1,243 45	" 3, "	1,243 45	394	" 3, "
		7,570 79					

323 No. 6.

Geo. B. Burnet	3,244 43	811 11	2,433 32	Sept. 2, 1886	2,433 32	375	Sept. 2, 1886
Harry Griswold, L. S. Blake, adm'r	3,138 92	784 73	2,354 19	" 3, "	2,354 19	398	" 3, "
James L. Mallory	3,667 23	*[916 81]	2,750 42	Draft sent claimant by Commissioner of Customs Nov. 18, 1886.			
Charles Luling	977 15	244 29	732 86	Sept. 2, 1886	732 86	376	Sept. 2, 1886
Julius R. Morris	1,623 80	405 95	1,217 85	" 3, "	1,217 85	395	Sept. 3, "
Wm. H. Rees	468 40	117 10	351 30	Sept. 1, 1886	351 30	359	Sept. 1, 1886
John Combs	1,082 60	270 65	811 95	Sept. 1, 1886	811 95	362	Sept. 1, 1886
Abner Reed	1,290 00	322 50	967 50	" " "	967 50	360	" " "
F. M. Noble	1,358 50	339 62	1,018 88	Oct. 8, 1886	1,018 88	602	Oct. 8, 1886
Fred. Hebard	1,929 25	482 31	1,446 94	Sept. 6, 1886	1,446 94	417	Sept. 6, 1886
	Dec. 2, 1886						
Elman Tyler	3,287 75	821 94	2,465 81	Draft sent claimant by Commissioner of Customs Dec. 1, 1886.			
D. O. De Wolfe, Louisa De Wolfe, adm'x, Edward H. Taft, adm'r; letter, Nov. 9, 1886, & Nov. 23d, 1886.	3,287 75	*[821 94]	2,465 81	Draft sent by Commissioner of Customs to Louisa De Wolf, adm'x.			
J. L. Cline, Malvin Cline, adm'x	1,998 40	499 60	1,498 80	Oct. 2, 1886	1,498 80	531	Oct. 6, 1886
Robert H. Percy, 20	1,189 35	237 87	951 48	Sept. 4, 1886	951 48	407	Sept. 4, 1886

[* Erased in copy.]

† Clark.

Exhibit H. M. B. No. 3—Continued.

Name.	Allowance.	Fee.	Remittance.	Date of remittance.	Remitted by check.	No. of check.	Date of check.
Jesse Babcock, Sara A. Babcock, adm'x; letter, Nov. 9, 1886, & Nov. 23d, 1886	1,121 35	*[280 34]	841 01	Draft sent by Commissioner of Customs to Sarah A. Babcock, adm'x.			
T. O. Peck	3,389 75	847 44	2,542 31	Sept. 1, 1886	2,542 31	361	Sept. 1, 1886
John D. Flint, 15	1,047 00	157 05	889 95	" 2, "	889 95	387	" 2, "
		6,342 16					

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No. 7.

Jno. R. Rouch	Fee in Wallace case	Sept. 1, 1886	136 50	373	Sept. 1, 1886	
E. T. Wood	Fees in cases of John Wood & Lyman Stiles	" 2, "	167 76	389	" 2, "	
Harris & Vance	In full for fees & 3 affidavits	" 4, "	156 17	399	" 4, "	
Maynard & Swan	In full for fees	" 4, "	115 68	406	" " "	
Martin Crocker	" " " Silas Dixon case	Oct. 11, "	316 02	418	" 6, "	
E. P. Rowley	" " "		62 10	419	" " "	
N. Dumont	" " " Styron case		534 58	Part cash & part check		
			1,488 81			

[* Erased in copy.]

325 *Suspended.*

Wm. A. Little, Newburyport, Mass.
[John X. Miller, Phila.]*
James W. Bond, Ipswich, Mass.
* * * Newport, R. I.
[S. W. Hall,]* New Bedford, Mass.
[Joseph Taber,]* " "
[Geo. F. Sisson:]* affidavit filed May 26, 1886.
[J. H. Holmes:]* " "
[Thomas Hurst,]* Detroit, Mich.
Charles J. Fales, Bristol; collector's report very adverse on service.
[Thomas F. Usher,]* " 20 days per month only; collector says $720 per annum.
[Catherine Sweeney,]* Susp. B'dge.
[Benj. Predmore,]* Lt. Egg Harbor; p'd in full to 1875.
[J. Q. A. Lothrop,]* Boston; $900; Apr. 1, 1880, to M'ch 3, 1881; E. P.
[David G. Butte,]* Edgartown; case good; revoked p. of a. to us.
[Chas. L. Peale,]* New London; not full service.
[Henry W. Gladding,]* Bristol; " "
[Levi B. Downs,]* Pamlico, " "
Calib Carr, Bristol; no service.

326 *Suspended, Sheet 2.*

James Tucker, Fernandina;		paid in full.	
J. J. Bunteau,	Detroit;	"	" "
Lister H. Colton,	"	"	" "
Joseph Evans,	"	"	" "
James S. Hurst,	" p'd to M'ch 31, 1875;	"	" "
Wm. Farnsworth,	"	"	" "
A. McIlhenny,	"	"	" "
Jacob W. Moore,	"	"	" "
D. M. Freeman,	"	"	" "
A. W. Leggett,	"	"	" "

Joshua Haley, Stonington; no service.
[H. A. Ashmore,]* Burlington, N. J.; see case.
Affidavit filed May 26, 1886.
[Wm. J. Alden,]* Plymouth; not full service.
Marcus Peters, Aroostook; paid in full.
F. H. Vanderburg, Pt. Huron; paid in full.
Theo. C. Drew, adm'r, Scituate, Mass.; affidavit & p. of a. filed July 15, 1886.
[Dead; Joseph G. Drew,]* Plymouth; not full service.
O. S. Wilcox, Cape Vincent; paid in full.
Alfred Meadus, Superior; " " "
Hiram K. Cole, " " " "

*[Matter enclosed in brackets crossed with ink in copy.]

327 *Suspended, Sheet 3.*

Johnathan Hudson, Detroit; paid in full.
Peter Nichols, Gloucester; " " "
Joseph Smith, Duluth; " " "
Affidavit filed May 26, 1886.
[Stephen Holmes,]* Plymouth; not full service.
N. H. Fordham, Sag Harbor; not good.
Ezra C. Smith, New London; paid in full.

*[Matter enclosed in brackets crossed with ink in copy.]

328	William Hukill, 20.	
	Moses Lowell, —.	
	W. P. Mason, Jr., 20.	No. 1.
	J. H. Holmes, 12½.	
	Daniel I. Hill, 20.	
	B. F. Miller, 20.	
	J. H. Bartlett, 33⅓.	
	W. H. Rand, 12½.	25 p. c., p. a. of M'ch 16, 1885.
	Milo L. Rice, 12½.	
	S. P. Bartlett, 20.	
	H. Lamb, 15.	
	John A. McKay, 50.	
	R. B. Biddlecom, 15.	
	Geo. L. Ewins, 15.	No. 2.
	John E. P. Wright, 20.	
	Peter Lander, 20.	
	A. J. Dudley, 12½.	
	H. C. Sanborn, 12½.	
	N. S. Smith, 20 (?).	See last settlement.
	Asa Larnerd, —.	
	R. H. Percy, 20.	
	H. H. Dean, 20.	
	Wm. Walker, 15.	
	B. F. Kelley, 15.	
	J. W. Haynes, 15.	
	Chas. E. La Duke, 15.	
	C. M. Booth, 15.	
	J. S. Spaulding, 20.	
329	Asa C. Palmer, 15.	
	N. H. Brown, 12½.	
	Wm. H. Beisel, 15.	
	Geo. W. Davis, 15.	No. 3.
	G. E. Blood, 15.	
	Geo. W. Brush, 15.	
	H. T. Benedict, 15.	
	A. S. Fleury, 20.	
	David P. Whitcomb, 15.	
	Henry E. Bedell, 15.	
	Charles Deal, 20.	
	John D. Flint, 15.	
	J. P. Thomas, 20.	

330 M'ch 14, with p. of a. Apr. 28, May 19, Sept. 16, Nov. 18.
Benj. C. Dearborn, Topsfield, Washington Co., Me.
M'ch 14, with p. of a. Apr. 28, Mar. 19, Sept. 16, Nov. 18.
J. L. Pierce, Machias, Washington Co., Me.
M'ch 14, with p. of a.
[Artell A. Hall, Damariscotta, Lincoln " "]*
A. B. Riford (dead), Benton Harbor, Berrien " Mich.
Apr. 28, Nov. 18. (From April, 1877, to Dec., 1880.)
[James J. Danhof, Grand Haven, Ottawa Co., Mich.]*
M'ch 14. Care Pack, Woods & Co., Refuses, Dresden, Saxony.
Edwin F. Holmes, Oscoda, Iosco Co., Mich.
M'ch 14, Apr. 28, May 19, Sept. 16, Nov. 18.
Albert H. Johnson, Northport, Leelman " "
M'ch 14, Apr. 28, May 19.
[Wm. E. Stewart, South Haven, Van Buren " "]*
Jan'y 18, 1887, with p. of a. M'ch 14, Apr. 28, May 19, Sept. 16.
Thomas E. Morris, Bargaintown, Atlantic Co., N. J.
Jan'y 18, 1887, M'ch 14, Apr. 28, May 19, Sept. 16.
(Clark.)
Andrew O'Neil, Lisbon, St. Lawrence Co., N. Y.
John B. Clough (?), Amherst, Lorain " Ohio.
Jan. 18, 1887, M'ch 14, Apr. 28, May 19, Sept. 16, Nov. 12.
From M'ch 1, 1876.
[Clinton Idlor (?),]* Put-in Bay, Ottawa Co., Ohio.
Jan. 18, 1887, M'ch 14, Apr. 28, May 13. In person.
[Eliphalet A. McWhorter, Satilla Bluff, Camden Co., Ga.]*
Jan. 18, 1887. St. Mary's.
[Frederick A. Hooke, Castine, Hancock " Me.]*
Robert S. Rogers, Havre-de-Grace, Harford " Md.
Jan. 18, 1887, M'ch 14. Paid in full.
[Geo. D. Wyman, Derby, Orleans " Vt.]*
Jan. 18, 1887, M'ch 14, Sept. 16.
Wm. M. Currier, Island Pond, Essex " "
331 S. A. Rendell, Stockton, Waldo Co., Me.
Benedict Yost.
Jan. 18, 1887; 29.
[Charles Johnston, Vermilion, Erie " Ohio.]*
[Hannah Moore, Boston, Suffolk " Mass.]*
Feb'y 3d, M'ch 12, M'ch 17, 29; Apr 1.
922 Carrolton Ave.
[Annie M. Hopkins, Baltimore, Baltimore " Md.]*
Jan'y 1, 1887.
Eliza L. Foxwell (dead), " " " Md.
Jan'y 1, 1887; Jan. 18, M'ch 12, Sep. 16.
Charles H. Lewis, Cold Spring Harbor, Suffolk " N. Y.
Jan'y 4, 1887; [letter returned.]†
Fred. S. Walls, Belfast, Waldo Co., Me.
Jan. 10, 1887.

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* [Matter enclosed in brackets crossed with ink in copy.]
† [In pencil in copy.]

[Harrison Southworth, Tappahannock, Essex Co., Va.]*
Jan. 8, 1887.
[Frank A. Slocomb, Onancock, Accomack " "]*
Jan. 24, Apr. 1, 1874, to Feb'y 1, '77, at $12 per annum; then to July 23, 1877, at $300.
[Edward L. Wright, Houghton, Houghton Co., Mich.]*
Jan. 24, M'ch 12, M'ch 18, Apr. 28, May 19, Sep. 15, Nov. 18 (Aug. 7, 1877, to Nov. 30, 1878).
W. W. Oliver, Escanabia, Delta Co., Mich.
Jan. 24, M'ch 12, Apr. 28; Feb. 1 to May 16, 1877; May 19, Sep. 15.
I. S. Chenowith, Ashland, Ashland Co., Wis.
Jan. 24, M'ch 12, Apr. 9, Apr. 28; Oct. 1, 1876, to Nov. 30, 1877. Sept. 15, Nov. 18.
Phillip H. Paine, Lake Linden, Houghton Co., Mich.
Feb. 8, M'ch 14, Apr. 28, May 19; July 1, 1876, to Nov. 30, 1877.
[Samuel S. Fifield, Ashland, Wis.]*
[Feb. 8, M'ch 14, M'ch 25, Apr. 28,]* May 19; [July 1, 1876, to July 9, 1877.]*
Sep. 15.
C. S. Jenkins, Cleveland, Ohio.
A. H.
With p. of a. Jan. 24, M'ch 12 (M'ch 18), Apr. 9, Apr. 28, May 19, Sept. 15, Nov. 18.
John C. Higgins, Delaware City, New Castle Co., Del.
Jan. 26, M'ch 12, M'ch 18, Apr. 28.
Whitehall,
[G. H. Lasley, Montague, Muskegon Co., Mich.]*
Jan. 29, M'ch 12, Apr. 28; Jan'y 1, 1875, to May 19.
David S. Beetle, Edgartown, Dukes Co., Mass.
332 Feb'y 3.
[S. H. Newton, Rouse's Point, Clinton Co., N. Y.]*
Feb. 4.
[G. P. Kingsbury, Muskegon, Muskegon Co., Mich.]*
Feb. 4, M'ch 14, Apr. 1, Apr. 28, Sept. 16, Nov. 18.
Manistee, Manistee,
Thos. J. Ramsdell, [Mackinac, Mackinac]* Co.
Feb. 4, M'ch 14, M'ch 19.
Pension Office City,
Henry M. Newcombe, Ludington, Mason " "
Feb. 4, M'ch 14, Apr. 28, May 19, Sept. 16, Nov. 18.
Silas L. Soule, Wareham, Plymouth Co., Mass.
(Paid to 1878.)
Feb. 8, M'ch 14, Apr. 28, May 19, Sept. 16, Nov. 18.
Henry Hooker, Morristown, St. Lawrence Co., N. Y.
Feb. 9, M'ch 14, Apr. 28, May 19; Aug. 1, 1875, to end of service, July 1, 1876.
[Benj. C. Moore, Champlain, Clinton Co., N. Y.]*

*[Matter enclosed in brackets crossed with ink in copy.]

Feb. 11, M'ch 14; April 1, 1880, to M'ch 2, 1881.
[John E. Proctor, St. Mark's, Wakulla Co., Fla.; Dumont.]*
M'ch 3, M'ch 21, Apr. 28, Sept. 16, Nov. 18; succeeded by Hancock Dec. 1, 1877.
Giles W. Young, Pamlico, N. C.
Nov. 17, p. of a.; M'ch 27, 1876, to October 15, 1878
Chas. T. Wicks, East Tawas, Iasco Co., Mich.
Nov. 19; from Aug. 10, 1875 to [end of service].*
Samuel Butler, Painsville, Lake Co., Ohio.

(2) Care Peckston & Wilcox Co.

333 *List of Cases.*

New power of att'y filed.†

[Harry A. Ashmore,]* Burlington, N. J.; from (affidavit filed June 4, 1886) Aug. 1, 1875, to Nov. 30, 1875.
[Wm. H. Beisel,]‡ Detroit, Mich.; from (affidavit filed—auditor) March 4, 1879, to M'ch 2, 1881.
[Calvin A. Blood,]‡ Huron, Mich.; from (affidavit filed May 26, 1886) Nov. 30, 1875, to the end of his service in that capacity.
[William Baird,]‡ [Huron, Mich.;]§ (duplicate, page 5:) [from Aug. 9, 1875, to M'ch 2, 1881.]§
[John Q. Barnard,]‡ Superior, Mich.; from Dec. 16, 1876, to end of his service, &c.
[Josiah R. Brooks,]‡ Superior, Mich.; from Dec. 16, 1876, to end of his service, &c.
[Reuben Barton,]‡ Champlain, N. Y.; from Jan'y 2, 1879, to M'ch 2, 1881.
[George W. Coomer,]‡ Detroit, Mich.; from March 4, 1879, to M'ch 2, 1881.
334 [Edward G. Crowell,]‡ [Barnstable, Mass.;]§ [paid in full;]‖ from Sept. 25, 1879, to M'ch 2, 1881.
[John T. W. Custis,]‡ Eastville, Va.; from (affidavit filed May 6, 1886; affidavit of Collector Toy filed Nov. 23, 1886) Sept. 30, 1875, to March 2, 1881.
[Silas Dixon,]‡ Detroit, Mich.; from (affidavit filed—auditor) March 3, 1879, to M'ch 2, 1881.
[David O. De Wolf,]‡ Cape Vincent, N. Y.; from Jan'y 1, 1876, to M'ch 2, 1881.
[John W. Funke,]‡ [Detroit, Mich.;]* from (paid in full) [March 3, 1879, to end of his service, &c.]*
[Minerva H. Glennie,]‡ adm'x, Au Sable, Mich.
[John W. Glennie,]‡ Huron, Mich.; from Nov. 30, 1875, to end of his service, &c.

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* [Matter enclosed in brackets crossed with ink in copy.]
† [Written with blue pencil in copy.]
‡ [Matter enclosed in brackets crossed with blue pencil in copy.]
§ [Matter enclosed in brackets crossed with pencil in copy.]
‖ [In pencil in copy.]

[Benjamin D. Gifford,]* Barnstable, Mass.; from Sept. 1, 1879, to March 2, 1881.

[D. M. Heath,]* Detroit, Mich.; from March 3, 1879, to March 2, 1881.

[Albert B. Holmes,]* Nantucket, Mass.; from Nov. 30, 1875, to March 2, 1881.

335 [Bela W. Jenks,]* Huron, Mich.; from (affidavits filed—auditor—Sept. 9, 1885) Dec. 1, 1875, to March 2, 1881.

[James M. Jenks,]* Huron, Mich.; from (affidavits filed—auditor) Dec. 1, 1875, to the end of his service, &c.

[Geo. J. Krebs,]* Sandusky, Ohio; from (affidavit filed May 26, 1886) Aug. 10, 1875, to March 2, 1881.

[Edwin B. Low,]* Champlain, N. Y.; from Dec. 1, 1880, to March 2, 1881.

[James Mitchell,]* Champlain, N. Y.; from Jan'y 1, 1877, to March 2, 1881.

[Joseph W. Sylvester,]* Sandusky, Ohio; from (affidavit filed June 7, 1886) Aug. 10, 1875, to March 2, 1881.

[John S. Smith,]* Detroit, Mich.; from March 3, 1879, to March 2, 1881.

[Nathaniel S. Smith,]* Eastville, Va.; from (affidavit filed Mar. 6, 1886; affidavit of Collector Toy filed Nov. 23, 1886) Dec. 1, 1875, to March 2, 1881.

336 [Stephen Sharpe,]* Oswegatchie, N. Y.; from Jan'y 7, 1878, to March 2, 1881.

[Philip W. Signor,]* Champlain, N. Y.; from (Sep. 1879)‡ Aug. 1, 1875, to March 2, 1881.

[Levi Trundy,]* Belfast, Me.; from Feb'y 1, 1879, to March 2, 1881.

[Edward Twiss,]* [Huron, Mich.; from]† (paid in full) [June 22, 1874, to Dec. 1, 1875.]†

[Ehman Tyler,]* Cape Vincent, N. Y.; from Jan'y 1, 1876, to March 2, 1881.

[Calvin W. Appleby,]* Cuyahoga, Ohio; from (affidavit filed Feb'y 2, 1886) Aug. 10, 1875, to the end of his service, &c.

[Abram G. Butler,]* Michigan, Mich.; from (affidavit filed May 26, 1886) Aug. 10, 1875, to March 2, 1881.

[Hiram Brown,]* Michigan, Mich.; from Aug. 10, 1875, to March 2, 1881.

[Otis Bradford,]* Detroit, Mich.; from (March 3, 1879)‡ April 1, 1879, to March 2, 1881.

337 Duplicate? §

[Reuben Barton,]* Champion, N. Y.; from Dec. 10, 1875, to March 2, 1881.

[William Baird,]* Huron, Mich.; from Aug. 10, 1875, to March 2, 1881.

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* [Matter enclosed in brackets crossed with blue pencil in copy.]
† [Matter enclosed in brackets crossed with pencil in copy.]
‡ [In pencil in copy.]
§ [Written with blue pencil in copy.]

[William F. Brown,]* Perth Amboy, N. J.; from Jan'y 1, 1877, to March 2, 1881.

[Hubbard M. Clemons,]* Sandusky, O.; from (affidavit filed June 11, 1886) Aug. 10, 1875, to March 2, 1881.

[Samuel Corner,]* Champlain, N. Y.; from Aug. 1, 1875, to March 2, 1881.

[J. L. Cline,]* Cape Vincent, N. Y.; from Jan'y 1, 1876, to the end of his service, &c.

[Albert Ellsworth,]* [Superior, Mich.; from Nov. 19, 1874, to the end of his service, &c.]†

[Harry Griswold,]* Milwaukee, Wis.; from Aug. 10, 1875, to March 2, 1881.

338 [Geo. H. Gregory,]* Huron, Mich.; from (affidavit filed May 26, 1886) Dec. 1, 1875, to March 2, 1881.

[Edward B. Harris,]* Sag Harbor, N. Y.; from (affidavit filed May 26, 1886) August 1, 1875, to March 2, 1881.

Dead. [George S. Harkins,]* Sandusky, Ohio; from (affidavit & p. of a. of executors filed May 26, 1886; letters of administration filed June 1, 1886) August 10, 1875, to March 2, 1881.

[Daniel K. Huntington,]* Sandusky, Ohio; from (affidavit filed May 26, 1886) August 10, 1875, to March 2, 1881.

[Albert C. Hayward,]* Superior, Mich.; from Dec. 15, 1876, to March 2, 1881.

[Louis M. Hartwick,]* Michigan, Mich.; from (affidavit filed May 26, 1886) Aug. 10, 1875, to end of service, &c.

Dead. Caroline M. Lowen, adm'x. [William Lowen,]* Sag Harbor, N. Y.; from (affidavit, p. of a., & letters of adm. filed June 28, 1886) Aug. 10, 1875, to M'ch 2, 1881.

[Charles Luling,]* Milwaukee, Wis.; from Aug. 10, 1875, to Oct. 31, 1876.‡
March 2, 1881.

[Mark Z. Lapham,]* Cuyahoga, O.; from Aug. 10, 1875, to March 2, 1881. Letters of administration and affidavit filed Apr. 24, 1886.

339 [Julius R. Morris,]* Milwaukee, Wis.; from Aug. 10, 1875, to the end of his service, &c.

[James L. Mallory,]* Milwaukee, Wis.; from Aug. 10, 1875, to March 2, 1881.

[James Mitchell,]* Champlain, N. Y.; from Jan'y 1, 1877, to Duplicate.‡
March 2, 1881.

[Orrin W. Robinson, Superior, Mich; from —.] §

Wm. H. Stoddard, Detroit, Mich.; from (affidavits filed — auditor) Aug. 10, 1875, to March 2, 1881.

Francis E. Witsell, St. Augustine, Fla.; from (affidavit filed May 12, 1886) Aug. 11, 1877, to April 26, 1880.

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* [Matter enclosed in brackets crossed with blue pencil in copy.]
† [Matter enclosed in brackets crossed with pencil in copy.]
‡ [Interlined in blue pencil in copy.]
§ [Matter enclosed in brackets crossed with ink in copy.]

[James J. Potter,]* Huron, Mich.; from (affidavit filed M'ch 29, 1886, — 1st auditor) Sept. 80, 1875, to May 1, 1879.

[O. W. Robinson,]* Superior, Mich.; from Dec. 15th, 1875, to end of service.

[P. C. Bird,]* Superior, Mich.; from Dec. 15, 1875, to Sept. 4, 1878.

340 [H. C. Carleton,]* [Superior, Mich.; from Jan'y 1, 1877, to Nov. 8, 1879.]† (Paid in full.)

[Albert Ladue,]* Champlain, N. Y.; from July 31, 1875, to Dec. 31, 1876.‡

Jan'y 16, 1877.

[F. M. Holden,]* Castine, Me.

[Frank Granger,]* Huron, Mich. (Affidavit filed Feb'y 11, 1887.)

[Chas. M. Bentley,]* " "

[Henry S. Ballentine,]* " "

[Andrew Green,]* Manitee, Fla.

[A. L. Parmester,]* Cape Vincent, N. Y.

[C. S. Bunker,]* Nantucket, Mass.

[W. A. Woodward,]* Huron, Mich.

[Archibald Campan,]* Detroit, Mich.; from Aug. 1, 1875, to March 2, 1881.

[J. A. Riopelle.]* Same as Campan.

[Louis Cicotte.]* " " "

[Alex. Maxwell,]* Kennebunk, Me.; July 1, 1880, to March 3, 1881.

[P. H. Ricker,]* Kennebunk, Me.; July 1, 1880, to March 3, 1881.

341 [Abner Reed,]* Cape Vincent, N. Y.; from April 6, 1877, to the end of his service as such.

[Lem. Van Boskerck,]* Yorktown, Va.; from Oct. 11, 1878, to Jan'y 21, 1881.

[Selden A. Jones,]* Huron, Mich.; from Aug. 19, 1876, to the end of his service as such.

[Virgil A. Crawford,]* Pamlico, N. C.; from March 18, 1879, to M'ch 2, 1881. Affidavit filed July 6, 1886; one Mr. Moffit's.

[William H. Tefft,]* Champlain, N. Y.; from (Mr. Martin's aft. filed June 28, 1886; affidavit filed June 9, 1886) Sept. 11, 1875, to Dec., 1880.

[George S. Lester,]* Huron, Mich.; from (affidavit filed May 26, 1886) May 1, 1879, to March 2, 1881.

[John P. Rieg,]* Cuyahoga, Ohio; from (affidavit filed Feb'y 2, 1886) Jan'y 19, 1877, to March 2, 1881.

[Israel B. Abbott,]* Pamlico, N. C.; from July 9, 1874, to March 2, 1881.

342 [Nathaniel Robinson,]* Huron, Mich.; from (affidavit filed May 26, 1886) Oct. 25, 1878, to March 2, 1881.

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*[Matter enclosed in brackets crossed with blue pencil in copy.]
†[Matter enclosed in brackets crossed with pencil in copy.]
‡[Interlined with blue pencil in copy.]

[B. F. Hinkley,]* adm'r estate of Thomas E. Scott, Bath, Maine; from June 22, 1874, to June —, 1876.

[Wm. H. Gibbs,]* Nantucket, Mass.; from Sept. 16, 1876, to the — of his service as such.

[David McDole,]* Chicago, Ill., from June 22, 1874, to April —, 1880.

[Andrew J. Kidd,]* Superior, Mich.; from Feb'y —, 1877, to March 2, 1881.

Anna E. Keeler, adm'x,

Dead. [William F. Keeler,]* St. Johns, Fla.; from (certificate & p. of a. filed June 28, 1876) May 1, 1878, to Dec. 6, 1880.

[Charles B. Tyler,]* Sandusky, Ohio; from (affidavit filed May 26, 1886) April 24, 1877, to the end of his service as such.

[Wm. Williams,]* Stonington, Conn.: from April 8, 1878, to March 2, 1881.

[Ethan Hammond,]* Oswegatchie, N. Y.; from April 1, 1876, to July 10, 1880.

343 [Geo. B. Burnet,]* Milwaukee, Wis.; from Nov. 6, 1876, to March 2, 1881.

[Ferdinand W. Guptill,]* Saco, Maine; from Aug. 3, 1875, to March 2, 1881.

[Roland H. Brelsford,]* Superior, Mich.; from July 20, 1877, to March 2, 1881.

[Will. H. Fuller,]* Michigan, Mich.; from (affidavit filed May 26, 1886) Nov. 23, 1876, to March 2, 1881.

[John Combs,]* Cape Vincent, N. Y.; from May 1, 1879, to Dec. 3, 1880.

[Asa Larned,]* Huron, Mich.; from April 21, 1879, (?) to March 2, 1881.

[J. Q. A. Lathrop,]* Boston, Mass.; from April 1, 1880, to March 2, 1881.

[Edward H. Green,]* Michigan, Mich.; from (affidavit filed May 26, 1886) —.

[Geo. M. Sackrider,]* Superior, Mich.; from —.

[Allen P. Tilton,]* Little Egg Harbor, N. J.; from —

[Herrick E. Warren,]† Champlain, N. Y.; from [Aug. 9, 1875, to M'ch —, 1881].‡

[Lawrence T. Remer,]* Huron, Mich.; from —.

[Nathan H. De Coster,]* Key West, Fla.; from Sept. 15, 1879, to March 2, 1881.

[Michael A. Powers,]* Superior, Mich.; from May 1, 1876, to Nov. 30, 1877.

344 [R. H. Percy,]* Cape Vincent, N. Y.; from May 1, 1879, to March 2, 1881.

[Frank D. Clark,]* Superior, Mich.; from Nov. 30, 1878, to March 2, 1881.

[Alida Riggs,]* widow of Joseph Riggs, Detroit, Mich.; from June 22, 1874, to end of service as such.

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* [Matter enclosed in brackets crossed with blue pencil in copy.]
† [Matter enclosed in brackets crossed with pencil in copy.]
‡ [In blue pencil in copy.]

[Noah S. McGarry,]* Passamaquoddy, Me. (two affidavits filed May 26, 1886—one of S. B. Berry; others on file); from June 20, 1878, to March 2, 1881.

Affidavit of Peter A. Martin filed May 27, 1886.

[H. M. Witherill,]* Champlain, N. Y.; from May 27, 1876, to Dec. 18, 1876.†
end of service.

[Frederick H. Hebard,]* Cape Vincent, N. Y.; from March —, 1878, to March 21, 1881.

[George T. Arnold,]* Michigan, Mich.; from (affidavit filed May 26, 1886) Aug. 2, 1875, to March 2, 1881.

[R. A. Bensell,]* Oregon, Oregon; from Oct. 23, 1876, to end of service.

[John W. Bartlett,]* Little Egg Harbor, N. J.; from (affidavit filed May 8, 1886) June 22, 1874, to end of service.

[Gage Inslee,]* Huron, Mich.; from June 22, 1874, to end of service.

[Edward W. Fisk,]* Cuyahoga, Ohio; from (affidavit filed Feb'y 2, 1886) March 17, 1877, to March 2, 1881.

345 [S. B. Dickerson,]* Middleton, Conn.; from Aug. 1, 1875, to end of service.

[William H. Coe]* [(deceased), St. Augustine, Fla.; from April to November, 1879.]‡

[Charles H. Coe,]* [St. Augustine, Fla.; from Nov. — 1879, to March 2, 1881.]‡

[James Bills,]* [Huron, Mich.; from May 1, 1875, to end of service.]‡

[Will. H. Solis,]* [Superior, Mich.; from Dec. 2, 1876, to end of service.]‡

[Barclay P. Adams,]* [Sag Harbor, N. Y.; from (affidavit filed May 23, 1886) July 13, 1880, to March 2, 1881.]‡

[John D. Flin,]* Detroit, Mich.; from [(suspended in office]‡ of com'r of customs) Aug, 10, 1875, to end of service.

[H. A. House.]* Cape Vincent, N. Y.; from July 31, 1875, to end of service.

[Charles Delamere,]* Michigan, Mich.; from (affidavit filed May 29, 1886) May 1, 1878, to March 2, 1881.

[Henry W. Butte,]* Edgartown, Mass.; from Nov. 17, 1875, to March 2, 1881.

[Darwin W. Shurtliff,]* Champlain, N. Y.; from Jan'y 17, 1877, to M'ch 2, 1881.

Chas. E. Aiken, Superior, Mich.; from April 1, 1878, to Feb'y 28, 1880.

346 [Wm. R. Durfee,]* Superior, Mich.; from May 10, 1877, to M'ch 2, 1881.

[Joseph P. Thomas,]* Castine, Me.; from June 22, 1874, to Oct. 27, 1880.

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*[Matter enclosed in brackets crossed with blue pencil in copy.]
†[Written with blue pencil in copy.]
‡[Matter enclosed in brackets crossed with pencil in copy.]

[James F. Moffatt,]* Cape Vincent, N. Y.; from June 1, 1877, to Aug. 31, 1879.

[James A. Crofer,]* Superior, Mich.; from July 23, 1877, to April 1, 1878.

[Cornelius Bosworth,]* Champlain, N. Y.; from June 22, 1874, to March 2, 1881.

[S. D. Mix,]* Champlain, N. Y.; from M'ch 21, 1878, to M'ch 2, 1881.

[Erastus S. Mead,]* Champlain, N. Y. (Sarah A. Mead, widow); from [Apr. 22, 1880, to Nov. 30, 1880]† May 1, 1879, to Mar. 2, 1881.

[Charles Deal,]* Champlain, N. Y.; from June 1, 1876, to March 2, 1881.

[Wm. A. Forrester,]* Oswegatchie, N. Y.; from June 22, 1874, to Mar. 2, 1881.

[T. O. Peck,]* Cape Vincent, N. Y.; from July 1, 1875, to March 2, 1881.

[Charles D. Staples,]* Vermont, Vt.; from August 1, 1875, to Dec. 30th, 1876.

[L. L. Penniman,]* Vermont, Vt.; from August 1, 1875, to March 2, 1881.

[John J. Bain, Jr.,]* Vermont, Vt.; from June 22, 1874, to the end of his service.

347 [Julius S. Dorman,]* Vermont, Vt.; from August 1, 1875, to the end of his service.

[Nathan K. Martin,]* Vermont, Vt.; from Aug. 24, 1875, to March 2, 1881.

[William H. Rand,]* Vermont, Vt.; from Aug. 1, 1875, to March 2, 1881.

[Charles Wells,]* Vermont, Vt.; from May 28, 1879, to March 2, 1881.

[Dwight Q. Follett,]* Milwaukee, Wis.; from (affidavit filed July 8, 1886) March 1, 1879, to March 2, 1881.

[N. H. Brown,]* Dalaware, Del.; from June 22, 1874, to March 2, 1881.

[Robert Hancock, Jr.,]* Pamlico, N. C.; from (affidavit filed May 13, 1886) Dec. 1, 1877, to March 2, 1881.

[Edward Ashman,]* Superior, Mich.; from June 22, 1874, to end of service.

[Joseph Fleshiem,]* Superior, Mich.; from June 22, 1874, to end of service.

[H. F. Milliken,]* Portland, Me.; from —— to ——.

[N. L. Hungerford,]* Vermont, Vt.; from April 1, 1875, to payment in full.

[Philip H. Raiford,]* per Mrs. F. J. R., widow, St. Mary's, Ga.; from Dec. 1, 1875, to Feb'y 28, 1878.

348 [Wm. H. Atkins,]* St. Augustine, Fla.; from (affidavit filed May 12, 1886) March 13, 1879, to April 21, 1880.

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* [Matter enclosed in brackets crossed with blue pencil in copy.]
† [Matter enclosed in brackets written with blue pencil in copy.]

[Henry E. Bedell,]* Vermont, Vt.; from Aug. 1, 1875, to M'ch 2, 1881.

[Chas. B. McLellan,]* St. Augustine, Fla.; from Jan'y 5, 1878, to end of service.

[Lorenzo Ricard,]* Vermont, Vt.; from (affidavit of J. S. Dorman filed July 8, 1886; affidavit of J. S. Dorman filed Feb'y 11, 1887; affidavit of A. S. Fleury filed July 15, 1886) June 22, 1874, to March 3, 1881. Affidavit of S. H. Newton filed Feb. 11, 1887.

[David P. Whitcomb,]* Vermont, Vt.; from (paid in full; letter Aug. 14, 1886, so saying)† Aug. 1, 1875, to end of service.

[Asa C. Palmer,]* Vermont, Vt.; from July 8, 1874, to end of service.

[Patrick H. Shields,]* Champlain, N. Y.; from June 22, 1874, to March 2, 1881.

[Allen S. Fleury,]* Vermont, Vt.; from (affidavit filed July 15, 1886; affidavit of N. K. Martin filed July 19, 1886) June 22, 1874, to M'ch 2, 1881.

[Geo. D. Sowles,]* Vermont, Vt.; from June 22, 1874, to end of service.

349 [J. S. Spaulding,]* Vermont, Vt.; from Sept. 8, 1879, to M'ch 2, 1881.

[Joseph Barthelow,]* Brazos de Santiago, Texas; from —— —, ——, to March 2, 1881.

nix‡

[James Lowe,]* Portland, Me.; from Nov. 9, 1877, to June 20, 1878.

[Fred. C. Blood,]* Huron, Mich.; from (affidavit filed May 26, 1886) May 1, 1879, to M'ch 2, 1881.

[J. H. Brooks,]* Vermont, Vt.; from June 22, 1874, to M'ch 2, 1881.

[Soloman Story, Jr.,]* Vermont, Vermont; from Aug. 1, 1875, to M'ch 2, 1881.

[Cassius M. Booth,]* Vermont, Vt.; from Dec. 1, 1875, to M'ch 31, 1880.

[H. T. Benedict,]* Vermont, Vt.; from June 22, 1874, to Jan'y 14, 1876.

[H. H. Rounds,]* Vermont, Vt.; from Aug. 1, 1875, to March 3, 1881.

[Geo. E. West,]* Vermont, Vt.; from Aug. 1, 1875, to March 3, 1881.

[John E. P. Wright,]* Vermont, Vt.; from (272 days) Dec 31, 1878, to May 12, 1879; from Dec. 31, 1879, to April 25, 1880, & from Jan'y 1, 1881, to March 3, 1881.

[Geo. W. McBride.]* Michigan, Mich.; from (affidavit filed June 1, 1886) April 9, 1875, to end of service.

350 [Geo. W. Brush,]* Vermont, Vt.; from June 22, 1874, to July 31, 1875.

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*[Matter enclosed in brackets crossed with blue pencil in copy.]
†[In pencil in copy.]
‡[Interlined with blue pencil in copy.]

[Geo. L. Ewins,]* Vermont, Vt.; from Jan'y 1, 1876, to March 2, 1881.

[Chas. E. Laduke,]* Vermont, Vt.; from Dec. 1, 1875, to March 3, 1881.

[S. E. Blood,]* Champlain, N. Y.; from June 22, 1874, to March 3, 1881.

[J. L. Wallace,]* Detroit, Mich.; from Aug. 10, 1875, to end of service.

[J. W. Haynes,]* Champlain, N. Y.; from May, 1879, to March 3, 1881.

[H. H. Dean,]* Vermont, Vt.; from January 1, 1875, to M'ch 3, 1881.

[E. J. de Medicis,]* St. Augustine, Fla.; from (affidavit filed May 12, 1886) June 22, 1874, to July 5, 1878.

[A. A. Reed, Richard O'Neil, & D. K. Zottman,]* each Vermont, Vt.; from Aug. 1, 1875, to end of service.

[Wm. P. Mason, Jr.,]* Vermont, Vt.; from Aug. 1, 1875, to March 3, 1881.

[H. H. Adams,]* Vermont, Vt.; from August 1, 1875, to March 3, 1881.

[Geo. W. Davis,]* Champlain, N. Y.; from June 22, 1874, to March 2, 1881.

351 [Milo L. Rice,]* Cuyahoga, Ohio; from (affidavit filed Feb'y 2, 1886) Aug. 10, 1875, to March 17, 1877.

[B. F. Kelley,]* Vermont, Vt.; from June 22, 1874, to March 3, 1886.

nix†

[Miles W. Hall,]* Detroit, Mich.; from date of reduction to March 3, 1881.

[J. M. Johnson,] Machias, Me.; from (his affidavit & certificate of bate and Sundays heretofore deducted — collector; filed July 16, 1886) M'ch 31, 1878, to M'ch 3, 1881.

[Calice Limoge,]* Vermont, Vt.; Jan'y 1, 1878, to March 3, 1881.

nix†

[E. B. Welton,]* Detroit, Mich.; Sept. 1, 1877, to M'ch 2, 1881.

[Walter Gray,]* May 1, 1879, to April 30, 1880.

[Wm. H. Rees,]* [Clayton, N. Y.:]§ June 26, 1875, to Aug. 31, 1877.

[James Lasby,]* Michigan, Mich. (affidavit filed May 26, 1886); Aug., 1875, to March 2, 1881.

[Crawford Dunn,]* Portland, Maine; from Dec. 1, 1877, to end of service.

[Charles O. Churchill,]* Plymouth, Mass.; from Dec. 1, 1875, to March 3, 1881.

[William Walker,]* [Vermont, Vt.; from Aug. 1, 1875, to —. (Paid in full.)]‡

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* [Matter enclosed in brackets crossed with blue pencil in copy.]
† [Interlined with blue pencil in copy.]
‡ [Matter enclosed in brackets crossed with ink in copy.]
§ [In pencil in copy.]

352 [Robert Jamison, Baltimore, Md.; from] (nix; paid in full) [April — to June 20, 1878.]*

[Peter Lander,]† Vermont, Vt.; from (new power of attorney filed Aug. 20, 1886) June 20, 1878. — Dec. 31, 1880.

[Gould D. Jennings,]† Fairfield, Conn.; from (new p. of a.; two affidavits filed March 30, 1888) June 22, 1874, to March 3, 1881.

[Geo. Matthews,]† Vermont, Vt.; from (new p. of a.) April 19, 1880, to March 3, 1881, and Sundays & holidays since.

D. C.

O. B. Curtis, Detroit, Apr. 16, 1880, — M'ch 3, 1881.
James Gifford, Barnstable, Oct. 1, 1879, " "
Samuel S. Baker, " " " " "
Simeon Atwood, " " " " "
Vinal F. Hatch, " Sept. 29, 1877, " "
John A. McKay, Key West, Oct., " June 20, 1879.
July 31, 1875.‡
Otis Little, Castine, Dec. 1, 1875, to Sept. 12, 1878.
John E. Nellis, Detroit, Jan'y 24, 1880, — M'ch 3, 1881.
New p. of a. & affidavits filed.
John D. Thompson, Detroit, April 19, 1877, " "
John T. Howard, Port Huron, Nov. 1, 1880, " "
V. W. McGraw, Detroit, M'ch 4, 1879, " "
S. P. Bartlett, Lt. Egg Harbor, Apr. 19, 1878, " "
Thomas H. Starr, Dunkirk, Dec. 1, 1875, to end of service.
J. H. Hamlin, Machias, Apr. 1, 1879, — M'ch 3, 1881.
See other application.§ M'ch 31, 1879.‡
J. M. Johnson, Dec. 1, 1875, " "
353 (Affidavit filed, c. of c., May 10, 1886.)
J. L. Schuyler, Cape Vincent, Jan'y 1, 1876, to end of service.
Matthew Hooper, Key West, Jan'y 25, 1879, — M'ch 2, 1881.
J. L. Cline, Cape Vincent, Jan'y 1, 1876, — end of service.
F. M. Noble, " " " " "
Jesse Babcock, Cape Vincent, " " " " "
Ezra S. Hamilton, Middletown, Dec. 1, 1875, [" " (?)]‡
James Paine, Jr., St. Augustine, May 24, 1878, — M'ch 3, 1881.
James G. Waugh, Bath, April 3, 1878, — [July 20, 1879.]‡
Asa Fish, Stonington, Dec. 1, 1875, " "
Dec. 1, 1875, to Dec. 31, 1876.‡
Jan'y 25,‖ 1875. ?‡
Joseph Hardy, Saco, Dec. 1, 1875, — July 20, 1879.
Homer W. Styron, Pamlico, Nov. 9, 1875, " "
Edwin S. Peht, Huron, Apr. 11, 1878, " "

[Matter enclosed between rules crossed with blue pencil in copy.]
*[Matter enclosed in brackets crossed with ink in copy.]
†[Matter enclosed in brackets crossed with blue pencil in copy.]
‡[Written with blue pencil in copy.]
§[In pencil in copy.]
‖[Written with blue pencil in copy and crossed.]

Lyman Styles, Detroit, M'ch 4, 1876, — end of service.
Dec. 31, 1879.*
Stephen H. Avery, Pt. Huron, July 10, 1877, — M'ch 2, 1881.
Bis†
Charles S. Bunker, Nantucket, app't to " "
F. H. Koch, Dunkirk, Dec. 1, 1875, — end of service.
Jeremiah Abbott, Pamlico, Nov. 9, 1875, — M'ch 2, 1881.
John M. Robertson, Huron, M'ch 30, 1880, " "
Rudolph Kern, Detroit, May 23, 1879, " "
Benj. Bulger, " Nov. 9, 1876, " "
Daniel Cole, " May 1, 1879, " "
Wilbur Howard, " Feb'y 25, 1880, " "
John Wood, " April 1, 1879, " "
3. D. C.
26†
Joseph Davis, Huron, Nov. 1, 1880, — M'ch 2, 1881.
Affidavit filed Nov. 11–23, 1885.
David D. O'Dell, Aug. 10, 1875, — end of service.
Louis A. Skarron, Beaufort, N. C., Dec. 1, 1875, — end of service.
O K† See this.†
Brad. C. Hurd, Huron (Dec. 1, 1875), Apr. 19, 1875. (?)
354 Geo. King, Detroit, May 1, 1879, — M'ch 3, 1881.
W. L. Damon, " Feb'y 25, 1880, " "
David E. Johnson, " Apr. 30, 1875, " "
James L. Kellogg, " M'ch 4, 1879, " "
John Higgs, " " " " "
J. B. Hinchman, " May 1, 1879, " "
Edward M. Smith, Swanton, Aug. 10, 1880, " " E. P.
John R. Bradford, St. Mark's, June 1, 1879, " "
C. E. Bury, Detroit, M'ch 4, 1879, " "
Chas. R. Davanals, " " " " "
Wm. N. Thayer, " " " " "
David E. Morgan, " Apr. 30, 1879, " "
Francis Hesse, " M'ch 4, 1879, " "
R. W. Brach, " " " " "
Alex. Ferguson, Huron, Aug. 10, 1875, — end of service.
Chas. S. Mins, " " " " "
David S. Butte, Edgartown, Mass.

[Matter enclosed between rules crossed with blue pencil in copy.
* [Written with blue pencil in copy.]
† [In pencil in copy.]

355 A call is made on the defendant for a list of fees collected by him on the partnership account for and during the 12 mounths prior to the dissolution other than the inspector cases which he claims as entirely his own.

In reply to the above call the defendant says that all such fees are scheduled in his suit at law against the said complainant, and that the said complainant has had the same served upon him in said suit.

A call is made on the defendant to file a schedule of the cases in his hands at the time of the dissolution of the partnership with the complainant or in which the said defendant had an interest secured or acquired during such partnership, the nature and condition of each of such cases, where filed, when, the amount claimed, the amount allowed, the fee contracted for or charged in each case.

In reply to the above call the defendant says that he does not remember any such cases except those in the Pension Office turned over to J. A. Vermilya & Co., with the complainant's knowledge and approval, and the cases then pending in the Indian Office and War or Treasury Departments received from John B. Clark, and other cases, and by arrangement in the hands of the complainant for prosecution. Defendant further says that he believes the complainant has the record books showing those cases, and that, not being able to find those books, he cannot more definitely answer said call.

356 Copy.

H. S. Cummings, Esq.

DEAR SIR: I have carefully read your so-called "Meditations," purporting to have been written by you in 1886, and am more than surprised that you could in your sober senses ever put such thoughts in writing.

I do not know when it has been my lot to read a more inaccurate statement both in letter and in spirit. I shall not take the time to reply to every false statement, but shall reply to the more important ones. But before proceeding to do so I wish to say that it seems very strange to me that you should have entertained such views as the "Meditations" express for three long years and during all that time sit in the same room with the offending party and never express any dissatisfaction to him; also that you should have meanwhile told third parties your alleged grievances, so that my very first intimation that you were not entirely satisfied should have come to me from persons who have no right whatever to know our business and business relations.

You say that in 1874 I requested a general partnership and that I repeated my request and that you finally agreed to it in the winter of 1875.

If you will recall the facts you will remember that there has never been any written agreement between us.

when the matter was considered by us in 1874 you said you had cases then pending and that you did not

wish to divided the fees in those cases. I replied that that was all right, and it was agreed that I was not to share in the
357 cases then on file. I deny that then or at any other time a partnership or partnership agreement than the verbal one entered into in 1874, until for reasons then fully given I proposed certain changes in 1886, which resulted in my buying all your interest in the so-called "inspector cases."

You speak of your services in the inspector cases and say "we discovered them."

I do not think you will, upon reflection, claim that you had any part in discovering them. You will probably remember that not until after I had explained and argued them with you that you even agreed that they might be good. You will also probably admit that I have had the management and control of them; that all the arguments, oral and printed, in the Treasury Department, before the Attorney General, before the Appropriation Committees, and in the Court of Claims have been made by me. In fact, I believe you do not claim that you did any of the legal work in those cases—only that you interviewed and fed public officials in aid of them. So far as such services were rendered in connection with Messrs. Bristoe and Conant the facts show, and you will probably admit, that they were futile. So far as Mr. Mahon is concerned, you are almost entirely wrong. When he refused to pass the cases was before the solicitor had rendered his opinion in favor of their payment.

Auditor Reynolds never passed a single case of his own volition. At the very time you were entertaining him he was visiting
358 the commissioner of customs and arguing against the cases on every debatable point. He did all he could against them and only passed them when the commissioner of customs had decided in their favor and when after that he went to the Secretary of the Treasury and tried to get him to interfere to prevent their payment and was told to state the accounts.

That the Court of Claims was influenced by your appeals to Chief Justice Richardson is too puerile to require anything more than mention. That we were ever in such desperate circumstances as you state you represented to him is news to me. All this "outside" work of yours was futile and unnecessary. As I had charge of the cases, it should not have been done without my knowledge and consent. I do not believe in it.

You are pleased to say that I have never had any cases of any account but these inspector cases.

In reply I have to say that outside of the inspector cases I have had more in number and a greater variety of cases than yourself. You probably forgot my moiety, collector's commissions, French and American Commission, and Alabama Court cases, not to mention many others. You also probably do not remember that during the nearly fifteen years we have been together you have never argued a case in any tribunal where you were required to think standing. You also mistake when you say I had my cases referred

to the Court of Claims. I opposed it and only went there because I must, but when it was a necessity I did go there and won my cases.

I did not ask the help of as you would have done under like circumstances.

359 When I bought you out in the "inspector cases" I did not mislead *ar* deceive you, as you intimate. I very frankly stated to you my position. I had not long before divided several thousand dollars with you. You had devoted nearly all of your time to the settlement of the Cooke estate, which business was not within the terms of our partnership understandings. I said as you were so doing I thought you ought not to share equally with me in the proceeds of my work. Upon this basis the trade was made. I understood that in other matters we were to divide, as heretofore. You admitted that my claim was just, and I paid you $15,000 and relinquished to you all rights to any proceeds, which you said you intended to share with me, of fees from the Cooke assignment. I understood that you then assented to my suggestion that I was entitled to more than one-half of those fees and that *out* trade was made on that basis. Your insinuations that you relied upon me to make the trade for your benefit, that you had no means of knowing the number, value, &c., of the cases, and that I in any manner misled you, is , and that is a very mild characterization of it. You had every book, agreement, and paper necessary to a full understanding of the whole matter; you had *then* in your possession for more than two weeks, and I think you took some or all of them to your house. More than this, I offered to answer any question you might ask relative to them or the cases. If you did not understand the whole matter you alone are to b*a*lme. I did not suppose you were in need of my guardianship. Had I

360 so supposed I should not have done business with you.

Your statement that you have lost thousands of dollars I introduced true but it is ever lost it upon dation or that I to you upon any business whatever general introduction them up, or they purposes is I gave them no whatever and assumed no or financial responsibility than that which always follows an ordinary introduction, the only exception to this was in the case of Mr. Hellen. I explained the whole matter to you; you thought it a good thing; you found the money. I was to have a share of our net profits and to bear my share of the loss, if any. There was a loss and I have refunded my share of it to you, with interest.

As to your other personal claims I will now only say that I know of no time you have loaned me any considerable sum for any length of time that you have not been paid interest, and that I never until I heard it on the street that in the few instances you have endorsed for me you did not do it willingly. Since then your name has not been used for my benefit.

361 There are some reasons why it does not seem advisable for us to longer continue in business together. One of them is that you could have kept (as you assert) such a paper as your "Meditations" for three years in your possession and never have shown it to me or even verbally complained to me of the matters it contains, while you have freely talked to others of its subject-matter so that they have been to me about it. One of them said, "Don't you know that Cummings is no friend of yours? If you don't, you ought to, for he isn't." Another reason is that you are continually talking about my affairs, and not always in terms of praise. I have asked you to stop it and have assured you that they are not proper subjects . Your remarks have frequently come back to me. Some have said, "How do you stand it?" My reply has usually been, "That is Cummings; everybody knows him and how he talks." But the fact that you are with me gives these gissipy remarks of yours more value than they would otherwise have. It is now about three years since we have had a settlement. There are expenses paid and fees received that are not divided. I have tried every year for a settlement, but have been unable to secure it. Last week I it, and for the first time your complaint in person.

I have answered your complaints. I want a settlement, then an agreement as to pending business, and then I will gladly arrange as to the occupancy of the office.

Will you co-operate with me in this?

Very respectfully,

(Signed) HENRY M. BAKER.

362 WASHINGTON, D. C., *Aug. 13th*, 1889.

H. S. Cummings, Esq.

DEAR SIR: I am in receipt of your letter of yesterday. So far as it relates to the past I find nothing new in it.

Your statement of what you allege I said three years ago is scarcely more than a repetition of your so-called "Meditations," but when you say I practically admitted the other day your "above facts" you are very much mistaken. I did do nothing of the kind. I do not now. I do very distinctly remember that you tried to get me to advise you which of several ways would be the best for you and that I very positively refused to do so. I said, Here are all the books and papers; you must decide for yourself. If you wish to ask me anything about them I will gladly answer you. I did answer all such questions which you asked. You really asked none. You may remember that more than once I asked you if you needed any explanation. When you intimate that I did not tell you the

truth, or that I misled you, you intimate that which is false. If you did not possess all the information needful it was wholly your own fault. You never asked to see a single paper which was not shown you. You never asked any information which I did not honestly give you. There have been more allowances than I anticipated. I am not blamable for that. Had they been less would you have been either legally or morally liable to return to me part of the purchase-money I paid you? You must here remember that you, according to our agreement, had not only $15,000, but all the fees from the Cooke estate, which, if they have not amounted
363 to from $10,000 to $20,000, you have yourself alone to blame.

Again you say, "I most certainly was misled; whether knowingly or intentionally on your part you can the best judge."

You say you was misled. That may be, but when you intimate that I did it in any manner you do not suggest the truth. If your imagination was as vivid then as — now is it would not be strange that it led you very far astray.

When you seek to excuse yourself for your long delay in calling my attention to your alleged "misleading" you really admit that your only cause of grief *it* that I have made more money out of the cases than you supposed I would, and seemingly forgot to admit that you told others of it months ago, and only told me when I insisted upon a settlement of the expenses paid and fees taken in other cases since I bought you out in the inspector cases. Do you seek to pay your honest debts by complaints which are not current anywhere?

You say I talked to you early in 1888 of the inspector cases as "our cases."

I certainly never intended to so express myself. I have no remembrance of ever doing so. If I did, you must have thought I spoke inadvertently or you must have supposed I had lost my senses or you were not in your right mind. Certainly, never since I bought and paid you for all your right, title, and interest in and to them, past, present, and future, I have never supposed for an instant that you had any more financial interest in them than the King of the Cannibal Isles. You have no more claim upon them than you have upon the hat I wear, which I paid for and not you, seemingly not so much, even, for I paid you for the cases,
364 though you had hardly lifted your hand to get or to win them; for the hat I paid another.

When you say I spoke of the fees to be obtained from those cases after 1886 as "our fees" you say that which I positively deny. I never thought so. I could not have said it, for I did not believe it.

You say you went to Ass't Sec'y Maynard three times at my earnest solicitation and add, "I think I earned a good fee for my services in the single matter of the drafts." That you rendered such service I very gladly admit, as I do that in my absence you rendered some other brief services for me in those cases. If you will present a reasonable bill for such services I will very gladly allow it upon the settlement I have been trying for more than two years to get. Lest you may be apprehensive, I will say here and

now that I have no charge against you for any services I may have rendered you during your absence or otherwise in connection with the Cooke estate.

As you admit you have talked about me, I have nothing more to say now on that topic, except that I should have much preferred that you had told your stories to me than about me. It certainly could have been no great inconvenience to have done so, as we occupy the same office.

As you have assented to my proposition for a separation as soon as we have a settlement, that may be regarded as determined.

As to a settlement, I fail wholly to comprehend the fairness or logic of your suggestions. Do you mean to say that because
365 I bought you out and paid you for all your rights to fees in my inspector cases that you are entitled to the whole fees in your cases where you never did buy me out? Does the fact that I was honest with you and paid you $15,000 in cash and relinquished certain matters which you said you were to divide with me destroy my rights in cases for which I was not paid and which I did not relinquish? If that is not your view of it, why do you propose to call everything "square to date" and to take your cases "without paying me for my interest in them"? Am I not just as much entitled to share in them since 1886 as in 1885? Please state why I am not entitled to be paid at least one-half of the fees in the Alabama cases I won and you collected; also why I should not be refunded one-half of the office expenses paid by me in excess of the amount paid by you? I have paid over $1,100 of such expenses. How much have you paid? Why should not I share in the fees in the Hoboken Land and Improvement Co. case which you won and I settled? Again, why should I — share in the Huestis case (if *one*) more than in the lost time or insurance cases when paid?

Whether or not I have "made money" has nothing to do with this matter. In matters of sentiment or generosity I will meet you more than half way. We should settle like men. I think we should sit down together and talk the whole matter over in the spirit of fairness and kindness. We should endeavor to harmonize and agree by ourselves. When will you devote the necessary time to it, today or early tomorrow?

When we have settled and closed our so-called partnership busi-
ness, then probably one or the other of us will retain the
366 present office. I wish now to call your attention to the facts that I have much more to move in the office than yourself; that I am ready to buy at fair prices such articles as you have there that can be of use to me, which you may wish to sell; that I personally occupy another room in the building, and that for other obvious reasons it will be more convenient for you to move than myself, and hence that I prefer to arrange with you for the office.

Very respectfully, ——.

367 *Decree for Accounting and Reference to Auditor.*

Filed Mar. 16, 1894.

In the Supreme Court of the District of Columbia.

HORACE S. CUMMINGS
vs.
HENRY M. BAKER. } Equity. No. 12263.

This cause coming on to be heard upon the bill, answer, and testimony, and being argued by counsel, upon consideration thereof the court doth this 16th day of March, 1894, adjudge, order, and decree as follows:

1. That the agreement and receipt dated the 6th day of *of* September, 1886, in the bill and proceedings mentioned be, and the same is hereby, cancelled and annulled.

2. That the plaintiff is entitled to an accounting by the defendant of the fees received from all the so-called inspector cases embraced in and covered by said receipt and agreement, said accounting not to include fees for business received by the defendant after the dissolution.

3. That there be also an accounting of and concerning all the other partnership matters (other than the said inspector cases not embraced in the said receipt and agreement); and in stating the account the defendant is to be allowed one-half of all the fees and commissions which the plaintiff received or reasonably should have received by reason of the assignment of H. D. Cooke & Co.

4. That this cause be referred to the auditor to take and settle the aforesaid partnership accounts, and in the execution of
368 this reference he shall consider the evidence already in the case and such other evidence offered by either party which the auditor may deem relevant and pertenant.

5. That the auditor shall give to the parties due notice of the time and place of executing this reference, and shall report his proceedings under this decree to the court for its action.

It is further ordered and decreed that in stating the account of fees there shall be deducted from the amount received by each party such sums as were properly paid by such party to other attorneys, together with such other proper expenses as may have been incurred by the parties respectively in the conduct of the partnership business; and in stating such accounts the auditor shall compute interest upon the respective balances from the date of dissolution of the partnership.

A. B. HAGNER,
Asso. Justice.

369 *Order of Court of Appeals Allowing Appeal.*

Filed Apr. 4, 1894.

In the Court of Appeals of the District of Columbia.

HORACE S. CUMMINGS, Complainant,
vs.
HENRY M. BAKER, Defendant. } No. 12263.

To the Court of Appeals of the District of Columbia:

Your petitioner, Henry M. Baker, respectfully represents that he is the defendant in the above-entitled suit in equity, No. 12263, in the supreme court of the District of Columbia; that the object of said suit is, first, to have the court set aside a settlement between the complainant, Cummings, and your petitioner of transactions involved in a partnership of which said Cummings and your petitioner were members; and, second, to have the partnership accounts thus reopened settled under the direction of the court.

II. On the 16th day of March, 1894, a decree was made in said cause setting aside said settlement and referring the cause to the auditor of the court to state the partnership account between said Cummings and your petitioner. A copy of said decree is hereto appended.

III. The amount claimed to be due from your petitioner to said Cummings on account of said partnership matters is about twenty-five to forty thousand dollars. The taking of said account will necessarily involve considerable delay and much expense.

370 Your petitioner is advised that it is doubtful whether he has any absolute right to appeal from said decree to this court. In order, therefore, that the rights of both parties may be protected and the main question in the case—the validity of said settlement—may be speedily determined, the petitioner prays that an appeal from said decree of March 16th, 1894, may be allowed by this court.

HENRY M. BAKER.

A. S. WORTHINGTON,
S. R. BOND,
Solicitors for Defendant.

I, Henry M. Baker, on oath say that I have read the foregoing petition by me subscribed and know the contents thereof; that the statements therein made are true to the best of my knowledge and belief.

HENRY M. BAKER.

Subscribed and sworn to before me this 31st day of March, 1894.

[SEAL.] WM. M. SMITH,
Notary Smith.

In the Court of Appeals of the District of Columbia.

Upon consideration of the facts of the within application it is ordered by the court this 4th day of April that the appeal be allowed as prayed.

Per curiam:

R. H. ALVEY, *Ch. Justice.*

A true copy.
Test: ROBERT WILLETT, *Clerk.* [SEAL.]

371 *Bond for Appeal to Court of Appeals, District of Columbia.*

Filed Apr. 4, 1894.

In the Supreme Court of the District of Columbia.

HORACE S. CUMMINGS
vs.
HENRY M. BAKER. } No. 12263. In Equity.

Know all men by these presents that we, Henry M. Baker, as principal, and Benjamin B. Bradford, as surety, are held and firmly bound unto the above-named Horace S. Cummings in the full sum of two hundred dollars, to be paid to the said Horace S. Cummings, his executors or administrators or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 4th day of April, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas the above-named Henry M. Baker has prosecuted an appeal to the Court of Appeals of the District of Columbia to reverse the decree rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is such that if the above-named Henry M. Baker shall prosecute his said appeal to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

372 HENRY M. BAKER. [SEAL.]
BEN. B. BRADFORD. [SEAL.]

Sealed and delivered in the presence of—

——— ———.

Approved the 4th day of April, 1894.

A. B. HAGNER,
Justice S. C. D. C.

DISTRICT OF COLUMBIA, *ss:*

Ben. B. Bradford, surety in the bond to which this is attached, swears that he is the owner of real and personal property situate in

said District of the value of ($1,000) one thousand dollars over and above all debts and prior obligations, and that he resides at No. 1764 K street N. W., in Washington, D. C.

BEN. B. BRADFORD.

Subscribed and sworn to before me April 4th, 1894.

FREDERIC S. DOYLE,
[SEAL.] *Notary Public, D. C.*

373 *Stipulation.*

Filed Apr. 19, 1894.

In the Supreme Court of the District of Columbia.

HORACE S. CUMMINGS } Equity. No. 12263.
vs.
HENRY M. BAKER. }

It is hereby stipulated and agreed that the record for the Court of Appeals need contain only the pleadings, testimony, exhibits, and decree passed March 16, 1894, and that the clerk in making up said record may—

1. Omit making a full transcript of Exhibit H. S. C. No. 1, and say: Exhibit H. S. C. No. 1 consists of 10 Treasury warrants and 102 drafts issued thereon in inspector cases to the different claimants, dated August 23, 1886, and subsequently collected by the defendant by virtue of powers of attorney from said claimants, amounting to $131,185.63.

One of said warrants is as follows, the other- being similar, but differing as to amounts and names of claimants, viz:

(Copy one warrant.)

One of said drafts is as follows, the others being the same except as to the amount and name of payee, viz:

(Copy one draft.)

And the following is a list of the payees and amounts of said drafts and the dates of payment marked thereon, viz:

(Making list as follows:)

Names of payees.	Amounts.	Dates of payment.

374 2. Omit making a full transcript of Exhibit H. S. C. No. 2, and say:

Exhibit H. S. C. No. 2 consists of copies of 147 letters written by

the defendant to the first auditor of the Treasury, transmitting powers of attorney in inspector cases and requesting the settlement of claims.

On the backs of said letters is noted the amounts allowed during the years 1888 and 1889 on the claims presented by them, aggregating the sum of $212,054.06, and at the foot of the letters is noted the dates of the allowances.

One of said letters is as follows, the others being similar, but differing in date and names of claimant-:

(Copy one letter.)

And the following is a list showing the names of claimants, dates of letters and amount of the settlements endorsed thereon, and dates of allowances as noted, viz:

Insert list as follows:

Dates of allowance.	Names of claimants.	Dates of letters.	Amounts endorsed.

3. Omit making a full transcript of Exhibit H. M. B. No. 1, and say:

Exhibit H. M. — No. 1 is a printed document of 276 pages, called "Executive document No. 70, House of Representatives, 49th Congress, 1st session," of which the title page and pages 13 and 14 and last page are as follows:

(Copying said pages.)

375 4. Omit making a full transcript of Exhibit H. M. B. No. 2, and say:

Exhibit H. M. B. No. 2 is a printed document of 94 pages, called "Executive document No. 225, 49th Congress, 1st session," of which the title page and pages 6 and 7 and last pages are as follows:

(Copy these pages.)

And say: Ink and pencil marks are made on said pages 13, 14, 6, and 7 as are on the exhibits.

5. Omit copying Exhibit H. M. B. No. 5, filed May 15, 1893, and say:

Exhibit H. M. B. No. 5, filed May 15, 1893, is a list of cases made by complainant as those of which he had charge and which were pending at the date of dissolution of the partnership.

6. Omit copying exhibit marked H. M. B. No. 1, filed May 15, 1893, and say:

Exhibit filed May 15, 1893, and marked H. M. B. No. 1, is a printed report, in shape of a circular letter, made by complainant

under date of January 12, 1886, as assignee of H. D. Cooke & Co., showing the progress made in the matter.

7. Omit the letter-press sheets of letter of defendant, marked H. M. B. 10, and use the copy marked H. M. B. 11, bound with his testimony.

And it is further stipulated and agreed that on the argument in the Court of Appeals counsel for either party may use or refer to any of the papers and exhibits which are in the case in the
376 court below, or copies of the same, and the figures of aggregates as given in items 1 and 2 above are subject to correction if not correct.

April 19, 1894.

FRANKLIN H. MACKEY,
Sol. for Complainant.
S. R. BOND,
Solicitor for Defendant.

377 Filed Apr. 20, 1894.

In the Supreme Court of the District of Columbia.

HORACE S. CUMMINGS
v.
HENRY M. BAKER. } In Equity. No. 12263.

Opinion of Justice A. B. Hagner.

This case was submitted at the end of the July term. After a very thorough examination of the law and testimony, I prepared a decree which was almost identical with the one I shall now sign. But upon further reflection, finding I was unable to rid myself entirely of doubts upon some of the important questions involved, which had not been particularly argued by counsel, I ordered a re-argument upon these points. This, on both sides, has certainly been very exhaustive and able.

I shall not now attempt an elaborate examination either of the law or the facts, but shall endeavor to express my conclusions in the briefest manner consistent with the importance of the case.

First. The first question for consideration is whether the bill presents a case calling for equitable relief, assuming its statements to be true.

378 A careful examination of its averments in the light of the decided cases has satisfied me this question should be answered in the affirmative.

If the transactions therein narrated had taken place between parties holding no relation of trust or confidence toward each other, it may be conceded these conclusions would not be perfectly clear. But this controversy grows out of dealings between copartners, with respect to the common property of the partnership, belonging equally to each; and the universal voice of the equity courts declares that such transactions should be examined with the

most careful scrutiny, and determined according to the strictest principles of the law.

Justice Story states this position in these words:

"Good faith not only requires that every partner should not make any false representations to his partner, but also that he should abstain from all concealments which may be injurious to the partnership business. If, therefore, any partner is guilty of such concealment, and derives a private benefit therefrom, he will be compelled in equity to account therefor to the partnership.

"Upon like ground, where one partner who exclusively superintended the accounts of the concern had agreed to purchase the share of his copartner in the business for a sum which he knew from the account in his possession, but which he concealed from him, to be for an inadequate consideration, the bargain was set aside in equity as a constructive fraud; for he could not in fairness deal with his other partners for their share of the profits of the concern without putting them in possession of all the information which he himself had with respect to the state of the account and the value of the concern."

Story on Partnership, § 172.

To the same effect is the conclusion of the learned author in 2 Lindley on Partnership (chapter 2, book 3, page 569), who,
379 after a review of all the authorities, holds that between copartners, of all men, there should ever be maintained *uberrima fides*, and that "one who seeks to benefit himself at the expense of his partner must have his conduct tried by the highest standard of honor." (Lindley, 771.)

Without pausing to refer to the very numerous cases cited by counsel, or to the many others that have come under my observation, I will content myself with quoting from the language of the Supreme Court in 2 Wall. 70, Brooks *v.* Martin:

"We lay down then, as applicable to the case before us, and to others of like character, that in order to maintain such a sale (by one partner to another) it must be made to appear, first, that the price paid approximates reasonably near to a fair and adequate consideration for the thing purchased; and, second, that all the information in possession of the purchaser, which was necessary to enable the seller to form a sound judgment of the value of what he sold, should have been communicated by the former to the latter."

Tested by the principles, there can be no doubt the bill presents a case which, if sustained by the proof, and found free from other objections, will justify a rescission of the assignment from Cummings to Baker of the 6th of September, 1886, and a decree for an account.

It is true the cancellation of an executed contract is the exercise of one of the highest powers of a court of equity, which should only be exerted upon satisfactory proof; but the cases exhibit repeated instances of the exercise of such an authority. If the court should allow the wrong-doer to retain possession of property ob-

tained from his copartner under circumstances denounced by the principles I have referred to, it would effectively justify the wrong, by taking the side of the wrong-doer.

380 Second. The prayer of the bill in this cause explicitly called on "the defendant to answer without oath"—"expressly waiving an answer under oath." The defendant, nevertheless, with equal explicitness, declined to "avail himself of the permission accorded by the bill to answer without oath;" and his answer is verified in the usual manner.

The defendant insists an answer cannot be deprived of its force as a pleading and evidence accorded by the principles of chancery practice, by such waiver on the part of the complainant; and that his right to the benefit of his sworn answer remains unaffected by any statement of this nature the complainant may see fit to make.

Our chancery rule 63, which is similar to the rule of the Supreme Court on the subject, declares that after such waiver by the complainant the answer shall not be evidence in the defendant's favor unless the cause be set down on bill and answer only; but that it may be used as an affidavit with the same effect as heretofore on motions respecting injunctions, or other incidental motions.

The defendant relies on the remark of Chancellor Walworth, who prepared the law to this effect passed by the legislature of New York, that its establishment was "the adoption of a new principle of law," and he insists a mere rule of court can have no power to deprive him of his previously existing rights in this particular, in the absence of similar legislation by Congress.

Without pausing to recapitulate the points of the contention on both sides, I will content myself with saying that, after full consideration of the arguments, I think our rule was established by competent authority, and that our uniform practice under it since its adoption has been entirely justified.

The answer of the defendant, therefore, at this stage of the
381 case cannot be regarded as evidence, any more than the averments of the bill itself can be so considered.

Third. Are the essential averments of the bill sufficiently established by the testimony?

The only witnesses as to the most important of the charges are the complainant and the defendant; for the testimony of Lease and Wilson is of little moment. This evidence is to be considered in connection with the numerous writings and documents referred to by each side, and according to the usual rules for weighing such testimony.

The parties are alike interested in the result; they are members of the same profession; for years they were friends and copartners; they appear to be of equal intelligence and education; and their associations and aims seem to have been similar.

In some few important parts of their testimony they are directly in opposition; but in others, of equal importance, there are such agreements in their evidence as may be said to amount to mutual admissions on the following points:

a. That Baker had the principal charge of the inspector cases,

almost to the exclusion of Cummings; indeed, Baker relies upon this fact as an important reason why he was equitably entitled to a larger share of the profits arising from their prosecution. He testifies he had done so much more than Cummings that he had become tired of doing all the work for only one-half of the fees.

b. That Baker, as the result of this exceptional labor in the cases, had acquired a far greater acquaintance and familiarity with the business than Cummings, and especially of its extent and value. Baker resents the intimation of Cummings that this constant work about the cases required no great skill or learning, by pointing out the difficulty and important character of the work thus de-
382 volved upon him; some of which, as arguments in court and elsewhere, he insists Cummings was not qualified to perform.

c. As a matter of fact, in the distribution of the firm business, the inspector cases were left to Baker to prosecute and collect the money, and, except in a few instances, to deduct the fees and remit to the claimant. He insists the discovery of the alteration in the statute was due to him, and that the suggestion to undertake the prosecution of the claims also came from him.

d. That Baker began to talk about the dissolution of the partnership early in 1886; and that the first suggestion that Cummings should sell his share in the inspector cases was made by Baker, who insisted there should be a dissolution unless Cummings would agree to sell out his share.

e. They differ as to the statement of Cummings that Baker said the fees already collected and not divided did not exceed $22,000, and that the total amount to be collected on unadjusted claims would not exceed $80,000. But Baker admits he told Cummings that $15,000 was "more than he ought to pay," and "more than he could afford to pay," for Cummings' entire interest in all the fees present and in anticipation.

f. That the fees actually earned, but not paid over, amounted to..... $32,971 57
From which was to be deducted fees due to other attorneys, amounting to 1,488 00

Leaving the net balance $31,483 57
Which would give to each partner..... ..... 15,741 78

or $741 more than the sum Baker said he could not afford to pay Cummings in settlement of his half of those fees then in hand; and it is also proved that the one-half of the fees to arise from
383 the $275,000.00, the aggregate of the claims yet to be collected, would amount to about $35,000.00. Supposing the same proportion (about $\frac{1}{22}$) of these fees was payable out of this sum to other attorneys, the $35,000.00 would be subject to be reduced by about $1,600.00, leaving the net proceeds from this source $33,340.00; which would represent the amount, on these figures, Cummings contends he gave away to Baker for nothing, beyond the relinquishment by Baker of one-half of whatever he was entitled to receive

from the Cooke estate, which Baker had long before declared he did not intend to claim.

g. That about $128,000.00, deposited at different times at Corson & McCartney's bank by Baker & Cummings, arose only out of these inspectors' claims; that it all was placed to the credit of Baker, and that the claimants, for the most part, were paid through checks on that fund, which, therefore, was practically to be regarded, as to this transaction, as a partnership account.

h. That up to the time of the assignment the most intimate relations existed between the partners, and that Cummings, up to this time, placed implicit faith in the integrity and friendship of Baker. Cummings' testimony that he had as much confidence in Baker at the time as any man living, and that he would have entrusted his entire estate to him during years of absence out of the country without hesitation, is quite consistent with his repeated requests to Baker to advise him as to what sum he thought he ought to take for his half. To none but a most trusted friend could a man have agreed to submit the naming of the price he ought to receive for the sale of his property to that friend.

i. That the $15,000.00 received by Cummings as the entire
384 price of this sale was nearly all paid out of the money Baker had already received for fees then actually due to Cummings; and that within a short time the residue, making up the entire $15,741.78, was realized from money collected by Cummings between the 7th and 29th of September, 1886, and by Baker after his return to the city, all of which went to the same account with Corson & McCartney's bank.

In effect, therefore, every cent Cummings received on the sale came from his own money already earned by him; much the greater part of which Baker ought to have turned over to Cummings before the 6th of September, 1886, when the agreement was signed.

Cummings thus by the admission of the parties, parted with a property interest of almost $50,000.00 in exchange for $15,000.00, paid to him out of his own money already earned. In view of these established facts, can it be said of this transaction that the first postulate laid down by the Supreme Court as indispensable to maintain a sale of a partner's interest in the partnership estate to his co-partner is shown to exist; namely, that it "appears the price paid approximates reasonably near to a fair and adequate consideration for the thing purchased"?

Is it within the bounds of credibility that Cummings, if he had known the value of what he was asked to assign, could have been stupid enough to have parted with it so needlessly, for so disproportionate a consideration?

Fourth. The second condition requisite to maintain in a court of equity a sale by one partner to another, according to the decision in Brooks *v.* Martin, is the proof "that all the information in possession of the purchaser which was necessary to enable the seller to form a sound judgment of the value of what he sold" had "been communicated by the former to the latter."

385 How stands the proof as to this requirement?

The bill charges the proposition that Cummings should sell out his interest in the inspector-cases fees was renewed repeatedly by Baker, who declared that if Cummings did not agree to sell out he would insist upon the immediate dissolution of the firm; that Cummings protested he knew very little about the amount of the claims, or of the probable fees, and was, therefore, really ignorant as to what his interest was worth; that he called more than once upon Baker to give him the information he needed, and begged him to advise him as to what he ought to do with respect to the sale.

It further avers that "at one of those conversations the defendant handed to the complainant a bundle of papers which he said contained information upon which the complainant could ascertain the value of the said interest, but upon examination of said papers the complainant was unable to gather therefrom any adequate information without the aid and explanation of the defendant; and thereupon the complainant, knowing that the defendant well knew all the facts, and reposing that confidence in him which the association of many years of professional and business relations had created (besides being entitled, as the partner of him, the said defendant, to be put in possession of all the knowledge which the defendant had acquired in the prosecution of their joint business), requested the defendant to inform the complainant, first, as to the amount due the firm on account of fees which were earned in said inspectors' cases, and for which appropriation had been made by Congress; and, second, the amount of claims not then appropriated for by Congress. And the defendant then and there stated to the complainant that

386 the amount of fees earned and payment of which was already provided for by act of Congress was but the sum of twenty thousand dollars ($20,000.00), and the amount of all other claims of said inspectors' cases, not then appropriated for, would be about $80,000.00, in which said last-mentioned cases the expected fee to accrue to the firm would be about $20,000.00."

"And this complainant avers that, relying on the deliberate statement of his said partner, the defendant, in relation to this branch of their joint business, which had been within the defendant's exclusive control, as aforesaid, for so long a time, he, the complainant, returned the said papers to the defendant, and stated to him that he would be willing to accept defendant's offer and to assign and receive as and for his interest in fees in all of said cases as follows: That is to say, of twenty thousand dollars of fees already within the congressional appropriation, one-half thereof, to wit, the sum of ten thousand dollars ($10,000.00), and for the remaining cases (unappropriated for) the further sum of five thousand dollars ($5,000.00), or in all the sum of fifteen thousand dollars ($15,000.00), which offer complainant was induced to accept solely by means of the said representations of the said defendant."

To these averments Baker replies that on the occasion referred to he gathered together and gave Cummings the various papers, enumerated on page 16 of the record, stating to him that any information requisite to their full comprehension would be furnished

by him; that Cummings kept these papers more than two weeks before the assignment was made; that he has no doubt Cummings fully understood everything of importance on the subject at the time; that he dealt with the complainant with perfect fairness, and if Cummings did not understand everything it was his own fault; that when Cummings returned the papers he told defendant he hardly knew what to say, and asked defendant's advice as to
387 what he should do, which he distinctly refused to give, telling him they were trading, and he must rely on his own judgment; that the next day Cummings came to the office and said he had been thinking over the matter, and if Baker would give him the $15,000.00 he would trade, to which he replied, "it was more than he could afford to pay," but that, to end the matter and have an end to the whole thing, he would give it to him.

The representations of the two parties are in substantial accord as to the nature of the papers Baker delivered to Cummings; as well as to Baker's omission to show or deliver to him the schedules marked "H. M. B. No. 3."

It is admitted that, for several weeks before the bargain, Baker had been using in the office those schedules, which contained the names of every one of their clients whose claims were comprehended in the last appropriation of Congress, with a memorandum of the amount to which they were each entitled; of the fee due the copartnership in each case, and of the proportion of that fee payable to other attorneys. Under appropriate headings Baker had also noted from time to time, opposite to each name, the date of the receipt of the moneys; of the remittance to each claimant, and of the amount sent to each.

It is clear Baker never showed this schedule to Cummings until after the assignment had been executed and delivered to Baker, and the check for $15,000 had been given by him to Cummings. Baker testifies this took place on the 7th of September, just as he was about to leave the city. He then told Cummings that some of the drafts payable under the last appropriation had not yet been collected, and requested him to receive the amounts, deposit them in the bank and make the settlements for them with the claim-
388 ants, from time to time, until his return to the city. For this purpose he handed Cummings a number of checks he had signed in blank on Corson's bank, which Cummings was to fill up with the name of the several claimants, as the drafts for their claims should come to hand, and transmit them to the parties entitled. Cummings complied with this request, and from day to day, from the 7th to the 29th of September, filled out the checks in his own handwriting and sent them to the claimants; noting on the blank spaces left in the schedules the several particulars as to dates and amounts, in the manner Baker had previously done in the other cases. On Baker's return Cummings returned him the schedules and Baker proceeded to complete the entries as to the remaining claimants until the paper was complete, as it now appears.

The schedules show that Baker had commenced the entries as early as the 30th of August, and he says he had prepared the schedules

before those entries were made. And yet, though he professes to have wished Cummings to understand everything connected with the amount of those claims, and of the fees, he neither delivered to him the schedules nor showed them to him until the 7th of September, when he needed the assistance of Cummings to complete the settlement with the claimants.

It is apparent it would have required considerable research on the part of one unfamiliar with the history of the claims to prepare for such settlement with the claimants if he had only the budget of papers delivered by Baker to rely upon. But the schedules would enable Cummings, without any delay and study, to obtain the knowledge to settle with the claimants, independent of all the other sources of information specified by Baker in his answer, which were already under Cummings' control.

389 If the other papers first confided to Cummings would have sufficed for this purpose, why did Baker, for the first time, intrust Cummings with the schedule? What tenable reason could be given why the purchasing partner, especially acquainted with these claims, if he had wished Cummings to arrive at an easy understanding of the amount, date, and particulars of the several claims before the assignment, should have refrained from handing those schedules to Cummings with the other papers, or instead of them? Under the circumstances, during the negotiation, hearing the repeated statements of Cummings of his ignorance of the business, Baker should have volunteered—indeed, insisted—upon showing and explaining the schedules to Cummings, who he knew was ignorant of the details of the claims, and almost of their general condition.

His refusal to show the schedule to Cummings subsequently, when requested by him after the dissolution, exhibited a similar disregard of his copartner's rights, and tends to explain his previous conduct.

If the other papers given by Baker to Cummings were adequate in Cummings' hands to a full understanding of the claims, they would have been equally instructive to Baker, and it would have been needless for him to have to prepare the schedules at all. If he prepared the schedules because the undigested mass of books and papers were not adequate in form for ready use by Baker himself, without such an abstract of their contents, which was undoubtedly the fact, then it was clearly his duty to have given the schedule to his copartner, his equal in every right by the terms and law of the partnership, and the co-owner with him of every dollar of the fees present and prospective.

390 Even if this withholding of the schedules had been only the result of carelessness and lack of appreciation of the importance to a full comprehension by Cummings, the act was a grave omission, and constituted a neglect of a plain duty required of him under the circumstances that would bar the approbation of the assignment by the court.

His declaration that $15,000 was "all he ought to pay," or "could afford to pay," uttered by one partner to another about a subject

with which he was presumably familiar, cannot be regarded merely as the *simplex commendatio* of a seller in an ordinary bargain and sale, even between strangers dealing at arm-slength, but must be considered as a distinct assertion of his belief; which, as was said by Judge Story in Stubbs *v.* Eddy, 4 Mason, 423, "is an affirmation of a fact, that is, of the fact of belief; and if it is fraudulently made to mislead or cheat another, to abuse his confidence, or blind his judgment, it is in law and morals just as reprehensible as if any other fact were affirmed for the like purpose. The law looks not to the nature of the fact averred, but to the object and design of the affirmation."

But if it be true that Cummings, by an attentive examination of the papers entrusted to him by Baker before the assignment, might have informed himself fully of the true state of affairs, that fact would not have atoned for any misrepresentations on the part of Baker, which were confided in by Cummings and made the basis of his action. If, as between strangers, a statement of importance relied on by the vendee and controlling his actions, proves to be incorrect, the seller cannot escape the consequences by saying, "What I said was false, but you ought not to have believed me."

Battelle *v.* Dennison, 20 W. L. Rep., 624.

Redgraves *v.* Hine, 20 Ch. Div., 1.

A multo fortiori, should this principle apply between partners, since the relations of trust and confidence naturally have a powerful tendency to disarm suspicion?

391 I have not time to advert to many considerations of importance arising out of the testimony. Among them is the fact that the payment was made by Baker to Cummings out of his own money deposited with Corson & McCartney in what was really a copartnership account. A similar circumstance was greatly relied upon in Helmere *v.* Smith (35 Ch. Div., 436), where a partner bought at a sheriff's sale a chattel interest of a copartner in the partnership, and paid for the purchase by a check drawn on the partnership account.

Lindley, the author of the celebrated treatise on Partnership, who was one of the justices sitting in the case, said:

"What makes this case particularly easy is this: When the sheriff sold under the *fi. fa.* to the continuing partner, he did not pay the money out of his own monies, but paid for the purchase out of the assets of the partnership."

Fifth. It remains to consider whether the delay of the complainant in instituting this action constitutes such laches as should debar him from recovery. The sale was made on the 6th of September, 1886. Cummings testifies he did not arrive at the conviction that imposition had been practised upon him until two years and eleven months afterwards, in August, 1889. The partnership relations between them were then still in existence; but the dissolution took place immediately afterwards, in September, which was fully three years after the sale. It was not until February, 1890, six months

after the discovery and three years and five months after the assignment, that the bill was filed in this case.

It is for the best interest of society that controversies should be adjusted speedily, and the statutes of limitations are framed
392 to compel the enforcement of this principle by courts of law. And courts of equity, which are moved to interfere, as a general rule, only in behalf of those who have not slept on their rights, require the exhibition of proper diligence in their assertion, and will demand a reasonable explanation for any undue delay.

Were these delays unreasonable under the circumstances?

The determination of the question whether the delay in any given case was reasonable, or the reverse, must depend upon its own circumstances. Courts of equity have sustained bills brought after three or four times as long a delay as that appearing here, while in other cases a much shorter interval has been considered as immoderate, and has been sustained as a sufficient defence on the ground of laches.

Cummings admits that soon after he had made the assignment doubts arose in his mind whether he had not been imposed upon; but he swears that his confidence and great reliance upon Baker caused him to silence the expression of those doubts as often as they occurred to him, until August, 1888. He testifies that shortly after he had signed the assignment he reduced to writing his doubts and beliefs in the paper called "Thoughts and Meditations," which he first showed to Baker nearly three years afterwards, and a copy of which has been offered in evidence by the defendant.

The paper would not have been admissible on the offer of Cummings, but was quite competent when introduced by the defendant as a declaration by Cummings.

Its statements are damaging in different particulars to each side. Assuming its statements to be candid and contemporaneous, it is conclusive proof that Cummings entered into the bargain
393 with misgivings of its wisdom, insisting he saw no reason why he should not be equitably entitled to as much of the fees as Baker, and that he thought Baker was acting selfishly in insisting upon the sale as the condition on which the partnership should continue.

On the other hand, it is filled with his asseverations that these doubts had yielded to the force of Baker's assurances of the moderate amount of the claims and of the fees the copartnership was likely to realize from them after deducting fees to other attorneys and expenses; that he believed these statements solely because of his implicit belief in Baker's integrity and his confidence in his his truth and honor; and that relying upon Baker's deliberate statements, and wholly because of his faith in him, he had concluded to comply with his urgent application, which, in view of the threat to dissolve made to a man shown to be then in embarrassed circumstances from his building engagements, might well be considered as an exigent demand, not to be resisted with safety to himself in his business relations.

In this frame of mind he claims to have accepted the situation in

good faith, and after he had executed the assignment he proceeded to perform Baker's request to settle with the claimants then unpaid. It is true, he then had in his possession the schedules, and that a proper examination of them would soon have convinced him that Baker had greatly underestimated the amount of the fees already earned. Assuming Cummings confided in Baker's integrity, as he swears he did, Cummings' statement that he then reconciled the discrepancy between the schedule account of fees and Baker's estimate to the alleged large deduction to be made on account of fees payable to other attorneys appears to be a sufficient explanation why Cummings did not at once repudiate the settlement
394 because of that discrepancy. The copartnership still continued, although Cummings assumed thenceforth no management of the inspector cases. His testimony (supported by the other proofs) shows that during the session of 1886–'7 no appropriation was made by Congress respecting the payment of the deferred claims; and that the next law on the subject was passed on the first of February, 1888 (25 Stats., p. 28), when an appropriation was made of $73,226.76 on this account. Up to this date, therefore, nothing had occurred to put Cummings on inquiry as to the correctness of Baker's representation on that subject. Cummings swears that when this act passed he observed the sum so appropriated was so near the amount named by Baker, that assuming it was a full settlement of all the remaining claims, he accepted it as a verification of the statement of Baker, and again aided him in the collection of the money. But after March 30, 1888, he was astonished to find Baker had obtained an allowance of that date for $62,661.37 in inspectors' cases, in one appropriation bill, and a further allowance of more than $46,000.00 in another bill of the same date. He then saw that the deferred claims thus allowed already exceeded Baker's estimate by at least $28,000.00; and when, in October, 1888, a still further appropriation of $110,636.64 was made, the doubts and suspicions that had been growing in his mind became so strong that he began seriously to investigate the entire subject, including the amount of the fees involved in the settlement of September 6, 1886.

I think this explanation, verified as it is by the proofs in the case, sufficiently accounts for Cummings' delay up to this point; which accounts for the space of two years after the assignment.

He testifies that he at once entered on these investigations
395 by obtaining from the Treasury all the information requisite to a full understanding of the cases, and this examination continued until late in the spring or early summer of 1889. About the 1st of August, 1889, having conclusively ascertained that the defendant had misrepresented the facts at the time of the contract, he immediately informed him of this discovery and demanded a full accounting. Receiving no satisfactory reply, he wrote him a letter on the 23d of August, 1889, begging replies to what appeared to have been very reasonable inquiries on the subject, and asking for information; to which Baker replied on the next day: "It is none of your business; I bought you out of these claims, horse, foot, dragoons, and all."

260 Up to this date, August, 1889, there had been no delay that is not satisfactorily explained. The intervening time between that time and February, 1890, when the suit was commenced, was occupied in further researches in the Treasury; in correspondence and interviews with Baker; in arrangements as to the dissolution, which occurred in September, 1889; and in discussion of a compromise. The five months thus employed do not constitute an unreasonable delay in bringing the suit after the full conviction on his part of the wrong he has sustained. Ordinarily, no right exists on the part of a partner to demand an account of the partnership affairs until after a dissolution; for while each partner is exercising his own rights and enjoying his share of the property there is no occasion for litigation; and the complaint here is that the agreement that excluded Cummings from his full rights in a part of the copartnership affairs being unjust and void in law, he must be regarded as having been entitled to full participation in all its rights up to the time the partnership relations were actually severed.

There is nothing to show any loss of witnesses or destruction of books or other alteration in the relative positions of the parties caused by the delay to the prejudice of the defendant. His statement that he has no books of account to produce before the auditor does not show that this is the result of the complainant's delay to sue; for it is evident he would have said the same thing if the suit had been brought in October, 1888, if it be true he never had any such books.

If the complainant had slept on his rights so long that great and serious injury would result to the defendant because of the delay, culpable laches might be imputed to him. But almost the entire evidence on the accounting, except that of the parties, will be derived from documentary proofs still in existence and unimpaired.

The court will look with leniency upon delay caused by sincere efforts to induce a compromise and prevent litigation, especially where it appears the complainant's equity was well known to the defendant from the time of the settlement; and a party insisting upon the strict application of the doctrine of laches under such conditions will not be the object of special solicitude of the court.

92 U. S., 101, Nebiitt *v.* McFarland.

For these reasons I do not think the delays of the complainant are of such a character, and are so free from reasonable explanation, that they can be imputed to him as culpabilities, disenabling him to maintain this suit.

I shall sign a decree annulling the assignment of the 6th of September, 1886, and ordering an account of the partnership affairs, with such limitations, and subject to such allowances to the defendant, as I think are right.

A. B. HAGNER,
Asso. Justice.

261 UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify the foregoing to be a true and correct transcript of the record of all the proceedings had in said court under the stipulation filed April 19, 1894, in the cause wherein Horace S. Cummings is complainant and Henry M. Baker is defendant, as the same remains upon the files and records of said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, this 4th day of May, A. D. 1892.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 339. Henry M. Baker, appellant, *vs.* Horace S. Cummings. Court of Appeals, District of Columbia. Filed May 4, 1894. Robert Willett, clerk.

262 & 263

FRIDAY, *June 8th*, 1894.

HENRY M. BAKER, Appellant, *vs.* HORACE S. CUMMINGS. } No. 339.

The argument of this case was commenced by Mr. S. R. Bond, for the appellant, continued by Mr. F. H. Mackey and Mr. H. O. Claughton, for the appellee, and concluded by Mr. A. S. Worthington, for the appellant.

HENRY M. BAKER, Appellant, *vs.* HORACE S. CUMMINGS. } No. 339.

Opinion of Court.

The opinion of Mr. Justice Hagner, in the court below (adopted by the Court of Appeals and ordered to be filed with the opinion of this court, and in the report of the case to be inserted preceding the opinion of this court adopting the same); (which opinion will be found on page 208 of this record.)

Mr. Chief Justice ALVEY delivered the opinion of the court:

This case, it appears, was argued and reargued in the court below, and the learned justice who heard the case has given it very full and careful consideration, as is shown by his carefully prepared opinion contained in the record. Both the law and the facts are fully and clearly stated in that opinion, and upon careful examination of the whole case, we entirely concur both with the reasoning and conclusion of the learned justice.

The only questions that would seem to admit of serious discussion, and which were much discussed in this court, are those in respect

to the application of the statute of limitations and the equitable doctrine of the lapse of time, pleaded and relied upon by the defendant. But those questions have been well considered and satisfactorily disposed of by the court below. Indeed it may be very much doubted whether any such questions properly arise in the case. It is very clearly shown, that the $15,000 paid over to Cummings by Baker on the assignment of the former's interest in the
264 inspector cases, was not in truth the money of Baker but was the money of the partnership of Cummings & Baker, deposited in the name of Baker; and that, in receiving the $15,000 as for his share or interest in the inspector cases, Cummings was in reality, and to all intents and purposes, receiving his own money, and not even the full amount due him, for and on account of the inspector cases previously earned, and actually realized or secured. This being so, the assignment of September 6, 1886, was not only voidable for misrepresentation and failure to make full and frank disclosures of the real state of the business, and the extent of the interest of Cummings therein, as held by the court below, but it was void from the commencement, and transferred no interest to Baker, because of the entire want of consideration—the $15,000 being received by Cummings in ignorance of his rights. If this view of the transaction be correct, and we perceive no reason to doubt it (Helmore *v.* Smith, 35 Chan. Div., 436; Brooks *v.* Martin, 2 Wall., 85), neither the statute of limitations, nor the doctrine of the lapse of time, as defences to the relief sought, would have any application. The assignment did not break up or terminate the relation of partners; but the partnership continued, not only with reference to the other business of the firm, but also with reference to the inspector cases; the assignment to Baker being without legal effect or operation. And that being so, and the partnership continuing until September, 1889, when it was dissolved, less than five months intervened from the time of dissolution to the time of filing the bill, on the 1st of February, 1890.

However, without insisting upon this view of the case, but treating the assignment as being voidable merely for misrepresentation and non-disclosure of material facts, we are of opinion that the court below was clearly right, and we shall affirm the decree appealed from for the reasons assigned by the learned justice in the court below. In either aspect of the case, the decree for an account was proper, and the basis for stating the account, as prescribed by the decree appealed from, is such as furnishes the appellant no just ground of complaint. The decree is affirmed, with cost to the appellee.

Decree affirmed, and cause remanded for further proceedings.

TUESDAY, *October 2d, A. D.* 1894.

HENRY M. BAKER, Appellant,
vs.
HORACE S. CUMMINGS.
No. 339. October Term, 1894.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia and was argued by counsel; on consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said supreme court in this cause be, and the same is hereby, affirmed with costs; and it
265 is further ordered that this cause be, and the same is hereby, remanded to the said supreme court for further proceedings.

Per MR. CHIEF JUSTICE ALVEY.

October 2, 1894.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the justices of the supreme court of the District of Columbia, Greeting:

Whereas lately, in the supreme court of the District of Columbia, before you or some of you, in a cause between Horace S. Cummings, complainant, and Henry M. Baker, defendant, equity, No. 12263, wherein the decree of the said supreme court, entered in said cause on the 16th day of March, A. D. 1894, is in the following words, viz:

"This cause coming on to be heard upon the bill, answer, and testimony, and being argued by counsel, upon consideration thereof the court doth this 16th day of March, 1894, adjudge, order, and decree as follows:

1. That the agreement and receipt dated the 6th day of *of* September, 1886, in the bill and proceedings mentioned be, and the same is hereby, cancelled and annulled.

2. That the plaintiff is entitled to an accounting by the defendant of the fees received from all the so-called inspector cases embraced in and covered by said receipt and agreement, said accounting not to include fees for business received by the defendant after the dissolution.

3. That there be also an accounting of and concerning all the other partnership matters (other than the said inspector cases not embraced in the said receipt and agreement); and in stating the account the defendant is to be allowed one-half of all the fees and commissions which the plaintiff received or reasonably should have received by reason of the assignment of H. D. Cooke & Co.

4. That this cause be referred to the auditor to take and settle the aforesaid partnership accounts, and in the execution of this reference he shall consider the evidence already in the case and such other evidence offered by either party which the auditor may deem relevant and pertenant.

5. That the auditor shall give to the parties due notice of the time

and place of executing this reference, and shall report his proceedings under this decree to the court for its action.

It is further ordered and decreed that in stating the account of fees there shall be deducted from the amount received by each party such sums as were properly paid by such party to other attorneys, together with such other proper expenses as may have been incurred by the parties respectively in the conduct of the partnership business; and in stating such accounts the auditor shall compute interest upon the respective balances from the date of dissolution of the partnership.

A. B. HAGNER,
Asso. Justice."

266 As by the inspection of the transcript of the record of the said supreme court, which was brought into the Court of Appeals of the District of Columbia by virtue of an appeal agreeably to the act of Congress in such case made and provided, fully and at large appears;

And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and ninety-four, the said cause came on to be heard before the said Court of Appeals on the said transcript of record and was argued by counsel:

On consideration whereof it is now here ordered, adjudged and decreed by this court that the decree of the said supreme court in this cause be, and the same is hereby, affirmed with costs, and that the said defendant, Horace S. Cummings, recover against the said complainant for his costs herein expended and have execution therefor; and it is further ordered that this cause be, and the same is hereby, remanded to the said supreme court for further proceedings.

October 2, 1894.

You therefore are hereby commanded that such execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Richard H. Alvey, Chief Justice of said Court of Appeals, the 19th day of October, in the year of our Lord one thousand eight hundred and ninety-four.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Costs of defendant paid by compl't.

(Endorsed:) Court of Appeals of the District of Columbia. No. 339. October term, 1894. Henry M. Baker, appellant, *vs.* Horace S. Cummings. Mandate.

In the Court of Appeals of the District of Columbia.

HENRY M. BAKER, Appellant,
vs.
HORACE S. CUMMINGS. } No. 565.

Supreme Court of the District of Columbia.

HORACE S. CUMMINGS
vs.
HENRY M. BAKER. } No. 12263. Equity. Docket 30.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

267 *Report of the Auditor.*

Filed June 18, 1895.

In the Supreme Court of the District of Columbia.

HORACE S. CUMMINGS
vs.
HENRY M. BAKER. } No. 12263. Equity. Docket 30.

This cause is referred to me to take and settle the partnership accounts. After giving the parties due notice of the time and place of executing the said reference, I proceeded with the same, and I return herewith the testimony and exhibits offered and submitted in proof by the respective parties.

Upon the call of the auditor the defendant filed an account of his receipts and expenses in connection with the partnership business under the decree of the court, to certain items of which objections were made by counsel for the plaintiff. Some of these objections were subsequently withdrawn, leaving but a few of the items in controversy.

In Schedule A, I have stated an account as between the two partners, made up from the succeeding schedule, and to which reference will be made hereafter.

In Schedule B, I have stated an account of the defendant of the fees received in the inspector cases (so called), described in this proceeding and in the decree. The only controversy as to this portion of the amount is a claim by the defendant that he should not be charged in this accounting with the fees collected in two cases which were allowed and the fees collected after the dissolution of September 1, 1889. These are the two claims last mentioned in the debit side of this schedule. The powers of attorney were received respectively in February and July, 1889. Both of the claims were allowed in October, 1889, and both paid in 1890. I am of the opin-

ion that these fees should be properly included in the charges against the defendant, and have so stated them in this schedule. He submits an alternative claim for extra compensation for services rendered in the prosecution and collection of these claims after the dissolution, which will be considered with the credit side of this account.

I have allowed all of the credits claimed by the defendant for moneys paid to other attorneys, for attorney fees and costs paid in suits for the recovery of fees, payments for clerk hire, stationery, postage, etc., and for travelling expenses; also for payments for services rendered before the committees of Congress and elsewhere in connection with these claims and the appropriations for their payment, the objections to this class of credits made by counsel for the plaintiff having been withdrawn.

A claim was presented by the defendant for compensation for personal services in obtaining, prosecuting, and collecting these inspector claims on the basis of the difference between one-half
268 and one-third of the net fees, which claim was subsequently amended by the substitution of a claim for personal services in obtaining, prosecuting, and collecting inspector cases subsequent to September 6, 1886, the amount so claimed being forty-two thousand seven hundred dollars, and against the objection of the plaintiff's solicitors I received evidence touching the extent and character of the said services as well as of their value, which testimony is returned with this report. This claim is presented and urged upon the ground that the decree annulling the sale of September 6, 1886, does not restore the status of the partnership as to the inspector cases, but only entitles the plaintiff to an equitable portion of the fees realized in the said cases, and that in the ascertainment of that portion the extra services rendered by the defendant in procuring, prosecuting, and collecting these claims after the date of the said sale and assignment and rendered in the belief that the plaintiff had no further interest in the said claims should be compensated for, especially as that belief was apparently acquiesced in by the plaintiff during the entire period. Cases are cited in which extra compensation has been allowed by courts to a surviving or remaining partner for services rendered in continuing and conducting the partnership business after the death or withdrawal of his copartner, but each of these cases is that of an absolute dissolution of the partnership relation. In this case, in my *my* judgment, the decree of the court annulling the assignment or sale has the effect of reinstating the partnership as it existed prior to that sale, as to the inspector cases, and to continue that partnership until the complete or general dissolution, in September, 1889. In this view of the case we must treat this claim of the defendant as that of one member of an active, existing partnership for an extra share of the profits realized from the joint business, on the ground of contributing to that business a greater amount of time and service than his copartner, a claim which cannot be maintained under any authority of text-writers or adjudicated cases, so far as my inquiry extends. I have therefore to exclude this claim from allowance in my account.

Referring to the claim of the defendant for extra compensation for services rendered after the dissolution in the two cases allowed and collected thereafter, I have to report that the evidence furnished does not disclose the extent of the services rendered after the dissolution of September, 1889, and I am unable to properly estimate the value of such services if the defendant were equitably entitled to such an allowance.

Of the net balance shown by Schedule B, each of the partners would be entitled to one-half. Against the share of the plaintiff and as a credit to the defendant I have allowed the sum of fifteen thousand dollars paid by the latter to the former on September 6, 1886. I have also allowed one-half of the fee to which the partnership would have been entitled in the case of the claim of Isaac G. Baker against the Government. It appears that this claim was in the hands of the plaintiff during the continuance of the partnership and was by him presented to the Court of Claims in the form of a petition, signed by the plaintiff as attorney-in-fact, and with the
269 name of Cummings & Baker as counsel. Subsequently the plaintiff transferred the said claim to another attorney, the original claimants making a contract with that attorney and giving him a power of attorney which he filed in the said Court of Claims, he then prosecuting the claim to a successful issue and receiving as compensation something like forty per cent. of the amount recovered, being twenty-one hundred dollars, one-third of which he delivered to the plaintiff. Upon the evidence produced I am of the opinion that the plaintiff is accountable to his copartner for what the firm should have received under the original contract or agreement touching this claim, to wit, twenty-five per cent. of the sum recovered. This amount is charged in this account as a collection by the plaintiff on behalf of the firm.

I am directed by the order of reference to allow the defendant in this account one-half of all the fees and commissions which the plaintiff received or reasonably should have received by reason of the assignment of H. D. Cooke & Co. The deed of assignment from this firm to the plaintiff, which is filed as an exhibit in this reference, provides that from the proceeds coming into the hands of the assignee there should be first paid the expenses of sales and collections and of preparing and executing the trust, including a commission of five per cent. upon the amount of said sales and collections, for his services in the discharge of the said trust. The sum of these sales and collections, as testified to by the plaintiff in this reference, is one hundred and four thousand nine hundred and seventy-seven dollars and seventy-one cents, upon which amount the plaintiff was entitled to retain the sum of five per cent., as provided by the deed of assignment. He testifies that he did not retain any sum for his commissions or fees, but that he holds certain securities as a guarantee for their final payment. I think that for the omission to retain these commissions from the moneys coming into his hands the plaintiff is alone responsible, and that the defendant is entitled to one-half of the sum which should so have been retained. I have therefore charged the plaintiff with these commissions as if they had

been retained or collected by him. It appears in the testimony in this cause, on page 67 of the printed record, being the testimony of the plaintiff, that the sum he had expected to charge for services under this assignment, including commissions on the collections and payments, was fifteen thousand dollars, and it is claimed here that, in view of his testimony, he should be charged with that sum as being the fees and commissions which he should reasonably have received. Notwithstanding the evidence of the plaintiff on this point, I do not feel justified in charging him in this account a greater sum than that stipulated by the deed of assignment, in view of the fact that there may be objections to any further or greater allowance to him and such allowance may not finally be made.

I have allowed the defendant credit for an amount claimed to be due to him by the plaintiff on partnership accounts other than those hereinbefore referred to and which appear formulated in a suit at law, No. 30197, which credit is conceded by the plaintiff.

The defendant, at the foot of his account filed, claims in-
270 terest on the several items of expenditure and disbursement, but I am unable to find in the case any sufficient reason for allowing interest on either of the items.

JAS. G. PAYNE, *Auditor.*

SCHEDULE A.

Account of the Partners with Each Other.

Henry M. Baker.

DR.

To net amount of partnership fees received by him, as per Schedule B.....	$97,820 14	
Less one-half, as his proper share.....	48,910 07	
		$48,910 07

CR.

By amount paid to the plaintiff September 6, 1886.....	15,000 00	
" one-half of 25 per cent. of the amount recovered on the claim of Isaac G. Baker, one-half of $1,312.50.....	656 25	
" balance due from the plaintiff on account stated and admitted.....	2,712 81	
By one-half of the commission which should have been retained by the plaintiff under the deed of assignment from H. D. Cooke & Co., commission 5 per centum on $104,977.71 = 5,248.88 — one-half.....	2,624 44	
		$20,993 50
Balance due H. M. Baker to the plaintiff—forward.....		$27,916 50

SCHEDULE A.

Partnership Account—Continued.

Balance due from Henry M. Baker to the plaintiff, Horace S. Cummings		$27,916 57
Interest on $27,350.09 from September 1, 1889, to July 1, 1895	$9,572 53	
Interest on $566.48 from October 30, 1890, to July 1, 1895	158 60	
Total interest to July 1, 1895	$9,731 13	

JAS. G. PAYNE, *Auditor.*

271 SCHEDULE B.

Account of Henry M. Baker of Fees Received in the Inspector Cases Described in This Proceeding.

DR.

To amount of fees received in said cases in 1886, as per Exhibit H. M. B. No. 3		$32,977 51
" fee received in claim of J. O. Mallory		400 00
" same in claim of D. O. De Wolf		443 14
" amount of fees received in said cases during 1888		64,823 34
" ditto in cases during 1889 and prior to September 1		6,353 68
To fees collected in claims on hand at date of dissolution and allowed and collected subsequently, as follows:		
In claim of Silas T. Soule	$300 93	
" " Wm. H. Sentell	265 55	
		566 48
		$105,564 15

SCHEDULE B.

Account of Henry M. Baker—Continued.

CR. $105,564 15

By amounts paid other attorneys, as per Exhibit H. M. B. No. 3	$1,488 81	
" attorneys' fees and costs paid in suits to recover fees	423 58	
" paid for stationery, postage, typewriting, &c	425 00	
" amounts paid for services before committees of Congress, &c	3,075 00	
" paid associate attorneys in 1887, 1888 and 1889	1,731 62	

" traveling expenses	150 00	
" paid for clerical work	275 00	
" paid W. E. Perry, servicess in New Jersey cases	75 00	
" paid Geo. C. Lewis, services in Vermont cases	100 00	
		7,744 01
		$97,820 14

JAS. G. PAYNE, *Auditor.*

272 CUMMINGS *vs.* BAKER.

APRIL 8, 1895.

Hearing pursuant to notice.

Present: Mr. Mackey for the plaintiff, and Mr. Bond for the defendant.

Mr. Mackey, for the plaintiff, makes the following objections to the account filed by the defendant in this reference on the 4th of February, 1895. We object as a credit to the amount of $1,075.00 "paid for services before Congress and elsewhere in inspector cases." We also object to a similar item of $2,000.00 "paid for services before Congress and elsewhere in inspector cases." We also object to the item of $16,212.29, being a credit to H. M. Baker "for professional services for obtaining, prosecuting, and collecting inspector cases, being the difference between one-half and one-third of the net fees." We also object to the item of $7,500.00, being a credit claimed for "one-half of the fees and commissions received, or which should reasonably have been received, by H. S. Cummings by reason of the assignment of H. D. Cooke & Co. to him."

In regard to the item of one-half of the fees in cases and business taken by said Cummings during the existence of the partnership, but not settled at the time of its dissolution and concerning which he should account, I am instructed by my client to say that he knows of no fees that have been collected by him and unaccounted for, other than those embraced in the credit of $2,712.81 claimed by Mr. Baker and which credit he admits.

Adjourned to April 10, 1895, at 2 o'clock p. m.

CUMMIN-S
vs.
BAKER.

APRIL 10, 1895.

Hearing pursuant to adjournment.

Present: Mr. Mackey for the plaintiff, and Mr. Worthington and Mr. Bond for the defendant.

HENRY M. BAKER, having been first duly sworn, testified as follows:

By Mr. BOND:

Q. Mr. Baker, in this account filed by you with the auditor you claim a credit of $1,075.00 under date of 1886, amount paid for services before Congress and elsewhere in connection with these cases. Will you state whether you expended that sum, and if so, how, for what purpose?

A. Of that amount I paid one thousand dollars to Henry C. Johnson, who had been commissioner of customs. He was thoroughly familiar with all these cases, having passed upon very many of them. He was then sent out of office and was acquainted with any members of the Appropriation Committee, and I asked him to explain to the members of the committee then cases which
273 were then pending for appropriation, which he did, and he charged me one thousand dollars, which I paid him.

Q. Did you take any receipt or voucher for that expenditure?

A. I did not.

Q. Was that after the date of your alleged purchase of the claims or before?

A. It was after. The services were rendered before, but the payment was afterwards.

Q. Why did you not take a receipt or voucher from him?

A. Mr. Johnson did not wish to be known in the matter, as he had so recently been a Government officer and passed upon these cases, and I knew him as a man of integrity, and I simply paid him the money and called it square.

Q. That was after you supposed the cases were your own, and you had no one to account to?

A. I had no doubt of it in my mind.

Q. Was he, in your opinion, of assistance to you—benefit to the prosecution of the claims and in obtaining the appropriation for the payment?

A. I have no doubt of it. The seventy-five dollars I do not remember how I made up at this moment. There were quite a number of small expenditures, and I may have lumped them. I know that the expenditures were hundreds of dollars greater than I have asked credit for here, for the reason that I had no memorandum, or no receipts were taken, but they were hundreds of dollars in excess of the claim here.

Q. Expended in the course of the prosecution and collection of these claims?

A. Entirely so.

Q. There is another item of two thousand dollars paid for services before Congress and elsewhere. Will you explain in regard to that—what that expense was?

A. The appropriation in 1887 failed and the allowances had been large, and it was necessary to be as certain as possible about the securing of an appropriation for the claims in the coming Congress, and I again employed Mr. Johnson. He worked in the matter, and I paid him eighteen hundred dollars.

Q. When was that—after?

A. That was paid in 1888 some time.

Q. What services did you employ him to do or did he render, as far as you know?

A. He saw the members of the Appropriation Committee, especially those of the subcommittee, explained the cases, explained the judgments or petitions in the Court of Claims, and generally gave any information that they might desire. I employed him because I supposed his statement of the cases would be better received than my own as a registered attorney. The two hundred dollars balance was paid to Neil Dumont, who had some powers of attorney from the same clients as mine. He had not filed them, but learned that the cases had been filed by me, and he came to me about them.

We had had some cases in dispute which led to suits in re-
274 lation to fees, and we compromised this matter by my paying him two hundred dollars, and his powers of attorney were never filed.

Q. That was for the relinquishment of the claims in your favor?

A. They were claims that I had powers of attorney for, but he had later powers of attorney than mine, and to obviate any contention or conflict I paid him the two hundred dollars.

Q. Did you take a receipt?

A. I have no receipt for that.

Q. Can you tell about the time of that payment?

A. In 1887 or 1888. I cannot tell which year; I presume in 1887.

Q. I will ask you whether these are part of the expenses referred to in your answer on page 17 of the record, where you speak of the expenses amounting to thousands of dollars which you had incurred in that matter?

A. They were part of them.

Q. And in your testimony, when asked what was the amount that was left due Cummings and Baker out of cases in 1886, you say "$31,488.70, but that does not cover any of the other expenses of the firm, which were large in a great many directions," I will ask you whether this was any portion of the expenses incurred?

A. The $1,075.00 was a part.

By Mr. WORTHINGTON:

Q. Referring to the credit which you claim in your account for $16,212.29 for personal services, please state what those services were and what is the ground for the claim.

Mr. MACKEY: I object on the ground that it is not within the scope of this reference.

Objection overruled.

A. In 1886 I represented to my partner, Mr. Cummings, that I was no longer willing to continue the partnership upon the original basis, and that I desired a dissolution of the partnership. He wanted to know upon what ground, and I told him because I had been doing nearly all the work and he had been receiving an equal amount of the proceeds. He said that he knew that I was doing most of the work, and that he was willing to take one-third instead of one-half of the fees in the inspector cases, and that he did not want a dissolution. I said that was worth considering, and we then went on that basis, and the final trade by which he was paid $15,000.00 was made upon the basis of his receiving one-third and my receiving two-thirds of the fees in those cases. In addition, I gave up my right to fees in the Cook assignment case, which were considered to be equal to $7,500.00, making the whole amount which I was to allow him $22,500.00; $15,000.00 was paid in cash and the remainder in the relinquishment, as stated.

Mr. Mackey objects to the answer as not relevant. Objection sustained.

275 Q. Please state what services you rendered in connection with the collection of these inspector cases after September 6, 1886.

A. After September 6, 1886, I took the entire charge of all of the so-called inspector cases; I secured, prepared, argued, and settled all of them, thus taking a large share of my time for three years. I worked on an average of about ten hours a day, and of that time fully eight hours a day were devoted to these cases. The other time related to the cases still in the partnership, in which Mr. Cummings had an equal share of the fees with myself, which fees have been duly accounted for and paid.

Q. How long after the 6th of September did you continue to devote this amount of time to these inspector cases?

A. Up to the dissolution of the partnership, September 1, 1889.

Q. That is, for three years?

A. Three years; yes, sir.

Q. During that period what services, if any, did Mr. Cummings render in connection with the inspector cases?

A. He rendered services in the settlement by getting the drafts cashed and making remittances to the clients in, I think, thirteen cases during my absence in 1886. He subsequently was occasionally asked, or offered when I was very busy, to put some papers in typewriting which I had prepared, and he interviewed Assistant Secretary Maynard in connection with the delivery of some of the drafts in 1888.

Q. That is a matter already covered by the testimony?

A. Yes; his services were merely nominal and could have been compensated with a few dollars, if compensation had been proper or

required. I may say in relation to the other cases which we had not covered by the assignment of 1886 that I brought more fees into the firm than Mr. Cummings, so that there was, on an even basis, no loss to him on account of the extra hours which I served on the inspector cases.

Q. As bearing upon the question of the value of your services in reference to the inspector cases during those three years, will you state how your knowledge and familiarity with those cases and the procedure and the laws relating to them and to the persons interested in them compared with that of other attorneys or claim agents in Washington?

A. I presume the other attorneys had no knowledge on the subject or they would have obtained the cases equally with myself. Some few attorneys obtained a few cases, but they relied on me wholly for the conduct and argument of every point involved, and in order that there should be no conflict in the prosecution and argument of them I either made arrangements with them to make such arguments or I bought their cases and thus obtained full control.

Q. How long a time prior to September 6, 1886, had you been acquiring knowledge of the laws and procedure in reference to these claims which enabled you to render efficient service in them?

A. I have given great attention to matters relating to the customs service of the United States for about twenty years.

276 Q. And how long had you devoted yourself to these claims particularly—how long had you been qualifying yourself to represent claims in that class prior to September, 1886?

A. The law under which these claims arose was enacted in 1874. I first became aware of the legality of the claims, in my judgment, in the fall of that year. I commenced active prosecution or procurement of them in June, 1875, and have devoted a portion of my time to them from that date until the date of the sale.

Q. As to the amount with which you charge yourself on account of fees in the inspector cases in your account filed here before the auditor (what proportion was allowed before the 6th of September, 1886), what part was allowed before September 6, 1886?

A. The item of $32,977.51, and also two cases, Mallory and De Wolf, entered separately, aggregating $843.14.

Q. Now, as to those cases, what services did you render after September 6, 1886?

A. The settlement of them.

Q. What do you mean by that?

A. The money had been appropriated by Congress and the final payments had been made, drafts issued, and I settled with the clients.

Q. As to the remainder of the fees with which you charge yourself, amounting to about seventy thousand dollars, I wish to ask you, from your acquaintance with the cases, having rendered the services in them that you state, and your knowledge of the compensation paid for that class of service at that time in this city, what, in your opinion, would be a fair compensation in the cases which produced fees amounting to about seventy thousand dollars, with which you

charge yourself, and confining yourself to services rendered after September 6, 1886?

Mr. MACKEY: I object.
Objection overruled.

A. I think my services in relation to these claims, from September 6, 1886, to 1889, were fully worth the fee charged—25 per cent.—and that, as claim attorneys are generally compensated, it was a reasonable fee and charge, and that I earned the same.

Q. What was the approximate amount of the sums collected in the cases for which you have claimed this seventy thousand dollars in fees?

A. The fees ranged, if I remember correctly, from ten to twenty-five per cent.; largely twenty-five per cent. At that basis there would be something like $250,000 in the aggregate. I do not remember the sum. I may say still further, in answer to this question, that if I had not been engaged upon these claims there were other claims in which I could have been quite as profitably employed, and that if the agreement of 1886 had not been made the firm would have been dissolved, and I would have been free to act as I pleased and as I did in relation to those cases.

Adjourned to April 15, 1895, at 1 o'clock p. m.

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APRIL 15, 1895.

The hearing in this cause is postponed to April 17th, at 2 o'clock p. m.

APRIL 17, 1895.

On account of the absence of Mr. Worthington, the case is adjourned subject to notice.

CUMMINGS
vs.
BAKER.

APRIL 24, 1895.

Hearing pursuant to notice.

Present: Mr. Mackey and Mr. Worthington and Mr. Bond.

Counsel for the defendant file an amendment to the account heretofore filed as to the item of $16,212.29, substituting therefor the following: "Amount due the defendant for personal services in obtaining, prosecuting, and collecting inspector cases subsequent to September 6, 1886, $42,700.00."

Mr. MACKEY: We object to the amendment of the record in this way, because that item, we submit, is beyond the scope of the reference in this cause.

The amendment to the account is filed and marked H. M. B. No. 1.

Examination of Mr. BAKER resumed.

By Mr. WORTHINGTON:

Q. Mr. Baker, at the close of the last session I had inquired of you as to what would be a fair compensation for the services rendered by you in the cases in which the fees aggregate seventy thousand dollars, as appears by your account, and you had answered that about twenty-five per cent. would be a fair fee. I did not ask you that question with reference to what would be a fair compensation between the claimants and their attorney, but what I wanted to get at was what, in your opinion, would be a fair compensation to be paid by the attorney or attorneys who held such claims with the right to prosecute them and retain a twenty-five per cent. fee to an attorney to whom they should turn them over and give him the labor and responsibility of their prosecution and collection. I mean by this if the attorney so employed were himself to have only a contingent compensation.

Mr. MACKEY: We object to the question on the same ground as heretofore, namely, that the question calls for testimony beyond the scope of the reference.

Objection overruled.

A. This seventy thousand dollars was made up of cases of different standing. There were included in that allowances secured from cases which at the time of the bargain and sale were suspended. Those aggregate in subsequent allowances something over
278 thirty-eight thousand dollars, aggregating nine thousand dollars of fees.

Q. Explain what you mean by suspended cases.

A. These suspended cases have been filed in the department, taken upon such evidence as had been submitted, and not deemed by the accounting officers sufficiently proven for allowance. At my request they were not disallowed, but were held suspended with permission to file further evidence and for a rehearing.

Q. Do you mean they were suspended on the 6th of September, 1886?

A. They were suspended on the 6th of September, 1886, and are the cases referred to in the printed record, which I offered to the complainant for a fee of five per cent. after the sale. I think in those cases it was worth the twenty per cent. which would have been left after the payment of the five per cent. to manage and collect them.

Q. Have you a list of those suspended cases?

A. I have (witness files list of suspended cases, marked H. M. B. No. 2), which shows the amount of the cases and the amount of fees derived from these cases.

Q. And forms part of the seventy thousand dollars referred to?

A. Yes, sir. At the time of the bargain and sale, September 6, 1886, there was a small list of some twenty names known as cases outstanding. They were cases which were believed to be good, but they had not placed their claims with any attorney for collection.

Some of those I subsequently secured, and also a considerable number of cases which at that time I did not know to be in existence. I have a list of those cases, aggregating fifty-eight in number, with a total allowance of $64,967.17, from which I collected fees aggregating $15,134.81, which list I file as an exhibit (marked H. M. B. No. 3). These I regard certainly as not worth more than five per cent. at the time of the sale, and that the other twenty per cent. should be properly assigned to me as compensation for securing, controlling, and conducting them to collection. This leaves about forty-three thousand dollars as the fee resulting from the cases then on file not suspended.

Q. By then you mean September 6, 1886?

A. September 6th, 1886. I think no one would have regarded those cases as worth more than ten per cent. of the fee, but in the amended claim which I have put in I have allowed twelve and a half per cent. on one-half of the fee, though in quite a number of the cases the fee was less either by original contract or by an allowance to other attorneys. I speak of twenty-five per cent. as the general rule, not the specific.

Q. Explain what you mean by saying you have allowed twelve and a half per cent.

A. That is, I have claimed twelve and a half per cent. of the fees secured as a proper allowance for my personal services in these last cases.

Q. After what date?

A. After September 6, 1886; that would leave an equal
279 amount for the value of the cases at the time of the sale. I regard this as more than liberal, for the reason that in cases that I purchased from other attorneys I gave them, as a rule, only five per cent. of the allowance, and the remaining twenty per cent. passed for the value of services to be rendered.

Q. Do you refer to cases in which other attorneys had procured powers of attorney to prosecute and collect cases on a fee of twenty-five per cent.?

A. And then they assigned them to me with an allowance of what is estimated as one-fifth of the fee or five per cent. of the claim.

Q. In order that the auditor may properly weigh these transactions which you have been referring to in the way of the purchase of claims from other attorneys, will you give us an idea, as nearly as you can, how many such transactions there were, with what attorneys, and for what period they covered?

Mr. MACKEY: I note an objection to all this line of examination, questions and answers.

Objection overruled.

A. I bought cases from Mr. Theodore E. Davis, an attorney in this city, and from Neil Dumont—probably there were some others that I do not remember—and I had local attorneys from whom I received cases in Detroit and Fort Huron, they securing powers of

attorney in my name and receiving as compensation a contingent fee of five per cent. or one-fifth of the fee allowed me.

Q. Do you recollect the number or amount of the claims which you purchased from Mr. Davis?

A. I do not.

Q. Or from Mr. Dumont?

A. Not either of them. They were paid for and no record was made of them; I simply remember the fact of getting them; there were not a great number; probably a dozen of them.

Q. Were these transactions before or after September 6th, 1886?

A. Both.

Q. And the rate was the same before as afterwards?

A. Exactly.

Q. Now, in reference to the first class of cases you spoke of, the suspended cases, will you give the auditor a general idea of the labor that was required in regard to those cases which had been submitted and suspended and held up for further proof?

A. In general they were suspended because there was not proof that the parties had been on duty each day of the year, or that they having appointments as deputy collectors only had performed the duties of inspectors of customs, or both. It became necessary to file proofs upon both of these points. If these proofs could be secured the cases were allowed; otherwise they were disallowed; and upon the list of suspended cases some were allowed and some finally disallowed.

Q. Where did those claimants live, some particular place or portion of the country, or were they over the country at large?

280 A. They lived all the way from Massachusetts to Michigan.

Q. About how many of these suspended cases—I mean cases which were suspended on the 6th of September, 1886—were disallowed, notwithstanding your efforts?

A. I cannot answer that question definitely, but I presume one-fifth of them.

Q. What compensation have you received for your services in those cases which failed?

A. Nothing whatever.

Mr. MACKEY: In addition to the objection already noted, which I understand applies to this entire line of examination, I also object to this question and answer because calling for and giving testimony which is a matter of record, and this is not the best evidence in the case.

Objection overruled.

Q. Now, as to the second class of cases—those in which you procured powers of attorney after September 6, 1886—let the auditor know what special labor and difficulty, if any, attended the getting of those cases into your hands.

A. Such of the cases filed as are included in the list? In those cases the claimants had been communicated with several times by letter, and in some instances I had personally visited the claimants. In other instances I visited them subsequent to September 6th, 1886.

It was a matter of long correspondence, and frequently the employment of local attorneys and efforts of various character to secure these various cases. Then after securing them they were filed and prosecuted in the same manner as the other cases.

Q. Were there any claimants from whom you sought to get powers of attorney and failed?

A. There were quite a number of them who employed other attorneys, and some who had, through letters and other sources of information, secured such knowledge that they prosecuted their cases individually.

Q. What compensation have you received for your labor in regard to those cases where you failed to get the powers of attorney at all?

A. Nothing whatever for the labor and expense.

Q. Have you any memorandum or statement showing how the amount of $42,700.00 is arrived at, which you claim in the amended item submitted today?

A. I have no formal memorandum or statement, but the whole amount of fees received in cases allowed after the sale of September 6, 1886, as shown by the account, is $71,177.02. About $47,000.00 of this amount was received in cases on file at the time of the said sale and not acted upon by the department. I have claimed for services in relation to those cases one-half of that amount, being $23,500.00. In the cases classed as "suspended cases" I subsequently secured fees aggregating $9,087.08, and I have claimed as proper compensation for managing those cases four-fifths of these fees, or $7,200.00. In the cases classed as "secured by me after September 6, 1886," I procured fees aggregating $15,134.81, and
281 I have claimed four fifths of those fees, or $12,000.00, which several amounts make up the amount stated in the amended claim.

Mr. MACKEY: We object to so much of this answer as undertakes to make proof of facts that are provable by matters of record, or at least matters which are in writing in the departments and can be proven by better evidence. The records of these cases are on file, and they should be proven as they would be required in any other cases and as we were required to prove our case in the case instituted, and I move to strike this testimony out.

Objection overruled.

Q. With reference to the largest of these three classes of cases, that of cases which were pending on the 6th of September, 1886, and which had not been suspended, I want to ask you whether there were any cases of that kind which were not collected and which failed.

A. There were some of them. In all of the cases there were about seventy that were wholly disallowed. I cannot state just the proportion of those that were of these several classes.

Q. In what way did the services that you rendered in these seventy disallowed cases compare with the amount of services required in the other cases?

A. Generally they were contested cases and contested as long as

there was any possibility of securing an allowance on them, which necessitated the average amount of work, at least.

Q. And, as to any one of these seventy disallowed cases, have you received any compensation for your services?

A. Nothing whatever for services or expenses.

Q. In the prosecution of these cases generally after September 6th, 1886, were you required to leave Washington?

A. In some cases I was. In some I went for testimony, in some I went to secure the cases, and in some I employed local attorneys to take the testimony and affidavits, etc.

Q. Give us an idea of where you went then, subsequent to September 6th, 1886.

A. I went to Burlington, Vermont, one trip; to Westerly, Rhode Island, on another trip; twice to New York city, and to Philadelphia, and some other places that I do not remember now.

Mr. MACKEY: I object on the ground that Mr. Baker has put in certain charges for clerk hire in certain places and we have allowed the same.

Q. Did any litigation grow out of these claims which required services in prosecuting and defending cases after September 6, 1886?

A. Do you mean as to the cases or as to the fees?

Q. Either.

A. There were no cases in court to secure the allowance on. All the settlements subsequent to September 6th, 1886, and for a time prior to that date were made in the departments, and those allowances reported to Congress for an appropriation. If the appro-
282 priation was made, they were paid. There were several suits instituted by me to recover fees—one suit in Michigan, one in Chicago, one in New York, and one in Connecticut, certainly—and various efforts were made less than suits to recover fees in other cases.

Q. Do I understand these were efforts to get from you that which you had retained as fees?

A. No; they were efforts made by me to secure fees from the clients when the draft had been sent to the client or when the Treasury draft had been put into the hands of another attorney.

Q. Now, in reference to this matter of getting an appropriation, what difficulty was there about this after the claims had been allowed—speaking, of course, of the same period, after September 6th, 1886?

A. After September 6th, 1886, I continued to secure allowances of the cases in the department which were reported to Congress, quite a large sum being so reported to the Congress in session in 1887——

Q. Do you mean the Congress that met in December, 1886?

A. Yes; Dec., 1886. I appeared before the committee, presented the cases, had the friendly assistance of some Congressmen, and employed Mr. Johnson, as before stated, to help me, but no appropriation was recommended by the House committee. The amount

reported was put on by the Senate committee and passed the Senate, but went out in conference and no appropriation was made in 1887.

Q. Give us an idea of the amount of time you spent about this matter of getting the appropriation during this session of Congress and in which you failed.

A. I was at the Capitol, before the committees, on several occasions—both the House and Senate; visited members of the committee from time to time at their rooms to explain the cases, and generally I suppose I was employed for perhaps two weeks on the matter, frequently working in the evenings. I remember that year having evening sessions with the Committee on Appropriations of the House by their appointment.

Q. Now, as to subsequent years about getting appropriations?

A. In 1888 the amount to be appropriated for had been increased by the amount of the allowances for that year.

Q. Doubled up, so to speak?

A. Yes; and as the appropriation failed there was an earlier appropriation made; that was attended to as in the preceding year, only with more earnestness; and then again a still later appropriation, both of which had to be looked after. In 1889 the amount allowed was considerably smaller and did not require very extensive effort. I looked after it, but not to the same degree as in the years 1887 or 1888.

Q. Were there any cases in which the fees were recovered after 1886 where you had any difficulty in getting the fees after an appropriation was made, other than those as to which you have already testified there was litigation?

A. There were quite a number of cases which were settled without litigation. In some instances I made a slight reduction
283 of fee for the purpose of immediate settlement; in other cases there was considerable correspondence about the matter, they not wanting to give the power of attorney, and correspondence resulted in my sending the drafts C. O. D.; sometimes the draft was split up in the Treasury, and one sent to the claimant and the other given to me by claimant's request; sometimes, after correspondence, draft was sent to me for my fee, and I ordered the Government draft sent to the claimant, and so on; I don't remember the details, only that these things occurred.

Q. During these years, after September 6th, 1886, when you were rendering these services you have been telling us about, where was your office?

A. 1411 F street northwest.

Q. Where was Mr. Cummings' office?

A. Up to about the 1st of September, 1889, we occupied the same office.

Q. Same room?

A. Same room—same building.

Q. Did you ever have any clerk or other assistant about this business?

A. Part of the time I did.

Q. What part?

A. Well, I could not tell you definitely. I had copying done from time to time. Miss Lathim worked for me on several occasions, sometimes two weeks or more.

Q. What proportion of these services after September 6, 1886, were rendered prior to September, 1889?

A. Fully nine-tenths.

Q. During that period what notice or warning had you that Mr. Cummings claimed any share of the proceeds of this work which you were doing?

A. No intimation whatever until about six or eight weeks prior to his leaving the office, when I demanded a final dissolution of all business relations.

Q. That has already been testified to in this case?

A. Yes.

Adjourned to April 27, 1895, at 10.30 a. m.

CUMMINGS
vs.
BAKER.

MAY 14, 1895.

Hearing pursuant to notice.

Present: Mr Claughton and Mr. Mackey for Mr. Cummings, and Mr. Worthington and Mr. Bond for Mr. Baker.

Examination of Mr. BAKER resumed.

By Mr. WORTHINGTON:

Q. In what you have testified as to a reasonable compensation for your services in the inspector cases after the 6th of Septem-
284 ber, 1886, did you or did you not take into consideration *of* the fact that the fees in these cases were contingent upon recovery?

A. I did; it is stated in percentages.

Q. Now, laying aside that feature of the case altogether and assuming that you were to be paid for your services, what would be fair compensation, without reference to whether the claimants were paid or not—what, in your judgment, would have been a fair compensation per annum for what you did?

Mr. MACKEY: I make the same objection to this question as to the former question of the same nature.

A. At that time I could easily have made ten thousand a year with the work which I put into these inspector cases after September 6, 1886. I think that would have been a reasonable compensation; certainly seventy-five hundred dollars would have been very moderate.

Q. You mean a year?

A. Each year.

Q. Now, to get at the same thing, but in a different way, what, in your judgment, were the inspector cases which the firm had on hand on the 6th of September, 1886, and which had not been allowed,

worth to the firm if they had been sold outright at that time and the firm stepped clear out of the business?

Mr. MACKEY: I object to that question as speculative and not within the scope of this reference.

Objection sustained.

Cross examination:

By Mr. MACKEY:

Q. Did you, as a matter of fact, do any more work in these inspector cases after the 6th of September, 1886, than you would have done if the paper of that date had not been signed by Mr. Cummings?

Mr. WORTHINGTON: I object.

Objection overruled.

A. It is almost impossible to answer the question directly, for the reason that if the sale had not been made the firm would have been dissolved and each would have managed whatever business he had or could procure.

Q. You have testified, as a matter of fact, that you did all or nearly all of the work in these inspector cases, did you not?

A. I have.

Q. Before the assignment?

A. Before the assignment and I did it afterwards.

Q. And did no more afterwards than you did before?

A. I have not said so.

Q. I ask you as a matter of fact.

A. I think I did more, because there was a greater number of cases on hand.

285 Q. If you did nearly all the work before September 6th, 1886, in these cases, what more could you have done after the assignment after that date?

A. I think that is evident if there were more cases.

Q. There were more cases, but in each of the cases did you do any more work?

A. Some cases required more work than others, and there would be no way that could be ascertained except by taking up each specific case and comparing them.

Q. Did you do any more work upon that class of cases after that date, the 6th of September, 1886, than you had been doing upon the same class of cases before that date?

A. I could not say positively whether I had worked fifteen minutes per day more or less on one side or the other.

Q. Did you do any more work in proportion to the work which Mr. Cummings did?

A. I think I did. Mr. Cummings very seldom did any work in the last three or four years.

Q. Did he do any more work before the assignment than he did afterwards?

A. I think he did. His work diminished from the time we entered into the partnership until the end of it.

Q. But you concede that you did nearly all the work in these cases and continued to do all after the assignment?

A. Substantially.

Redirect.

By Mr. WORTHINGTON:

Q. After the sale or the assignment of September 6th, 1886, in what proportion, as nearly as you can state, was what remained of the firm's business transacted by you and by Mr. Cummings? I mean outside of the inspector cases.

A. I think I did at least twice the work, outside the inspector cases, which Mr. Cummings did for the firm.

Mr. MACKEY: We object to the question as not within the scope of the inquiry.

Q. In regard to the productiveness of your labor and his after September 6th, 1886, and while the firm lived, leaving out the inspector cases, what have you to say to that?

Mr. MACKEY: I object.

Objection sustained.

Adjourned to May 18th, at 2 o'clock p. m.

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CUMMINGS
vs.
BAKER.

MAY 16, 1895.

Hearing pursuant to adjournment.

Present: Mr. Bond and Mr. Mackey.

ALLAN RUTHERFORD called by Mr. Bond.

ALLAN RUTHERFORD, having been first duly sworn, testifies as follows:

By Mr. BOND:

Q. Please state your residence and occupation and also your place of business.

A. Attorney-at-law; place of business, Atlantic building; residence, Gaithersburg, Md.

Q. State if you have held any position in the Treasury Department; if so, what and during what time.

A. I was Third Auditor of the United States Treasury for a little over seven years.

Q. During what time?

A. From 1870 to 1877, I think.

Q. Have you been in your present occupation ever since that time?

A. I have.

Q. Have you had occasion to give much, and, if so what, attention to the collection of claims against the Government?

A. Yes; I have had a large number of cases of that character in the Court of Claims and before the Government departments.

Q. Do you know of the class of claims usually designated as "inspector cases"?

A. Well, I only know of them from having seen them in the published reports of the Court of Claims. I have never had any of that class myself.

Q. What cases do you refer to in the Court of Claims, if any?

A. Well, the test case that was brought to determine the rights of inspectors of customs. I think the case was the case of Adams against The United States.

Q. Do you know where that is reported?

A. I think it is in the 20th volume of the Court of Claims Reports.

Q. Do you know who prosecuted that claim?

A. The attorney of record was Henry M. Baker.

Q. Supposing, say, in the fall of 1886 an attorney or attorneys had obtained and filed in the Treasury Department, with powers of attorney to him or them, a large number of cases belonging to the class of inspector cases mentioned, upon which no action had been taken, and for which no appropriation had been made and no evidence filed, and the fees in which were to be, say, twenty-five per cent. of the amount finally collected, and were to be collected from the claimants after the allowance of the claims, the fee being
287 wholly contingent thereon, what, in your opinion, would be a fair price for another attorney to pay for the purchase of those claims?

Mr. MACKEY: I object.

Objection sustained.

Q. Supposing claims of the character and class mentioned in the last question had been so filed in the Treasury Department, no evidence had been taken or filed, and no appropriation had been made, and these claims were placed in the hands of an attorney thoroughly familiar with them and the principles involved and the decisions theretofore made, and that attorney obtained the necessary evidence thereafter and worked during about three years upon them, and ultimately collected about one hundred and eighty thousand dollars upon them, and obtained forty-seven thousand dollars in fees from the claimants for their collection, his compensation to be wholly contingent upon the collection of the claims and fees, what, in your opinion, would be a fair compensation to him for his services in collecting those claims and fees, the number of different claims making up the one hundred and eighty thousand dollars being from one hundred and fifty to one hundred and seventy-five and the services being rendered between September 6, 1886, and September, 1889?

Mr. MACKEY: I object to the question, because it has not been shown that the witness is an expert in regard to these cases. He is

asked if he has had any experience in these cases, and he says he knows nothing about them except from having seen them in the published reports of the Court of Claims.

Second. It is a hypothetical question based upon a state of facts that do not exist in this case; and

Thirdly. Because it is asking the witness' judgment upon the value of a contingent fee.

Objection overruled.

A. If the attorney has to pay all the expenses connected with perfecting these cases, obtaining all the evidence, and takes his chances after the allowance of collecting his fee from the claimant, in view of the regulation a short time before adopted by the Treasury, by sending the drafts direct to the claimants instead of to the attorneys who secured them, I should say that the attorney who took the cases and prosecuted them under those circumstances would be entitled to four-fifths of the fee. I would not take them myself for less, and I have had cases in which I have had that much.

Q. If no powers of attorney in cases of the class above named had been obtained and no claims filed, what, in your opinion, would be a fair compensation to a competent attorney who should obtain powers of attorney and claims from a list of claimants furnished him and should file and prosecute them, collecting upon them about sixty-five thousand dollars and receiving a fee or fees amounting to fifteen thousand dollars, such compensation to be paid to him by another person who was equally interested with him as a partner in that business, claims numbering about seventy?

288 Mr. MACKEY: I object for the reason that the question is not based upon the theory of any extra work done by Mr. Baker after the assignment.

Objection sustained.

Q. Supposing that claims of the above-mentioned class and character, amounting in all to two hundred and fifty to two hundred and seventy-five thousand dollars, were held by two attorneys and one of them should undertake to do, after they were filed, all the labor necessary to their collection, working about eight hours a day for three years—from September 6, 1886, to September, 1889—in their prosecution and collection and the collection of the fees and obtaining of appropriations, and should collect that amount and about twenty-five per cent. as fees for their prosecution and collection, he being conversant with the business and competent for its prosecution, what, in your opinion, would be a fair compensation to be paid to him per annum by his copartner or co-owner for such labor and service?

Mr. MACKEY: I object on the same ground.

Objection overruled.

A. I can only answer that by saying that I would not undertake the cases under such circumstances for less than six thousand dollars per annum, if I had to give my time and attention to it.

Q. You would consider that fair compensation to an attorney thoroughly competent to do the work and who worked at it faithfully?

A. I should.

Cross-examination.

By Mr. MACKEY:

Q. Supposing instead of the class of claims of the character of cases mentioned by Mr. Bond the cases were but a continuation of a series of claims arising under the statutes, which these attorneys have been prosecuting for years previous—as, for instance, a case where the Government had been paying an inspector of customs so much a year and it turned out that under the law he was entitled to so much more a year, or, rather, that the Government had been paying him so much per day and it turned out that he was entitled to be paid so much more per day, that record of the service was in the department, and that all it required was a written letter to the department by the attorney, requesting that the client be allowed the difference between that which had been paid him by the Government and that which he was entitled to under the law, and that amount, as I have already stated, had been fixed by the courts, and the only question was how many days he had served, and that appeared of record in the department, and no evidence was necessary, and nothing more was necessary to be done in the case other than I have said, the filing of a letter asking for the additional compensation, and the computation was done by the department, and the department admitting its liability, no controversy of fact or
289 law existing between the department and the attorney, and that these cases having been once allowed by the department, and subsequent applications were simply for the additional amount accruing by reason of the continued service of the inspector—if the cases were of that character, would not your estimate of the value of the attorney's services per year be quite different from that which you have stated, to wit, six thousand dollars a year?

Mr BOND: I object to the question on the ground that it is contrary to the facts in the case as proven by the testimony already taken.

A. I have never heard of such a case and my experience has been varied. Every obstruction is placed in the way of the claimant, every quibble that can be raised is raised. I never in all the experience that I have had have known of an instance in which the claimant or his attorney could simply file a letter and ask for a settlement and obtain it; on the contrary, I have been on the plainest cases for months and years, where there was nothing but a simple question of computation.

Q. Your answer to Mr. Bond that the services of an attorney were worth six thousand dollars a year was based on such a state of facts as you have just detailed, that the Government threw every obstacle in the way of the attorney, and so on?

A. Yes; that has been my experience.

Mr. BUTTERFIELD called by Mr. Bond.

JOHN W. BUTTERFIELD, having been first duly sworn, testifies as follows:

By Mr. BOND:

Q. Mr. Butterfield, please state your residence and occupation.

A. I live at 419 4th street N. W., this city; am a lawyer by profession.

Q. State whether or not you have held any office or position in the Treasury Department of the United States; and, if so, what, and during what period.

A. I was in the Second Comptroller's office for a period from about 1861 to 1876, to about May or June of 1876. I was what they call now a chief of division; it was law clerk then.

Q. Did that office have charge of claims presented against the Government?

A. Yes, sir.

Q. State whether or not you have had any experience, and if so, what, since that time in the prosecution and collection of claims of different classes against the United States.

A. I have been engaged in the prosecution of claims against the United States since 1876; cases in the Court of Commissioners of Alabama Claims, both courts; Court of Claims in general jurisdiction and spoliation claims, and some few in other jurisdictions of that court, and also against the United States in the executive departments, particularly the Treasury.

290 Q. State whether you have had any knowledge of or acquaintance with the class of claims commonly known as "inspector cases."

A. I only know of those cases, with one exception, from a discussion of the question with Mr. Cummings, and particularly with Mr. Baker. I prosecuted one single claim of that sort.

Q. Then you have some acquaintance with the method of presenting and prosecuting claims of that character?

A. Yes.

Q. Supposing an attorney or attorneys had secured and filed in the Treasury Department, with powers of attorney to them, claims of that character amounting to some one hundred and eighty thousand dollars, and on which they were to receive a contingent fee on the claims when collected of twenty-five per cent., and were to collect that fee as their compensation, no evidence having been filed in support of the claims and no action having been taken by the department on them, and no appropriations having been made to pay them, they being thus held in September, 1886, what, in your opinion, would be a fair and reasonable compensation to be paid by those attorneys having the claims to one of themselves, or to a third party or attorney being conversant with those cases and thoroughly competent to prosecute them, who should succeed in collecting the above amount and fees to the amount of forty-seven thousand dollars for his services during those three years for so doing, basing it

upon a percentage which was to be a contingent compensation for the service?

Mr. MACKEY: I object.
Objection overruled.

A. I should say, and that has been my rule, irrespective of the character of the claims—some are difficult and some are simple—that where the two attorneys had each a moiety of the fee and one of them retired for any cause, that the party who prosecuted them would take one-half of his fee—that is to say, if it was twenty-five per cent., each having twelve and a half per cent., and one attorney took the cases and prosecuted them he should have one-half of twelve and a half, or six and a quarter, making his fee eighteen and three-quarters per cent.—in other words, three-fourths of the whole fee.

Q. Supposing that claims of the above-mentioned class and character, amounting in all to two hundred and fifty to two hundred and seventy-five thousand dollars, were held by two attorneys, and one of them should undertake to do, after they were filed, all the labor necessary to their collection, working about eight hours a day for three years—from September 6, 1886, to September, 1889, in their prosecution and collection and the collection of the fees and obtaining of appropriations, and should collect that amount and about twenty-five per cent. as fees for their prosecution and collection, he being conversant with the business and competent for its prosecution, what, in your opinion, would be a fair compensation to be paid him per annum by his copartner or co-owner for such labor and service?

291 A. In regard to that, I should put it on a different ground; not as percentage, but simply as services, and that would depend a great deal upon the value of the claims, the amount of fees, and there being no percentage allowed at all, but simply for services. In such a case as that—losing sight of a percentage I should have myself—I would say I would not prosecute them for five thousand or six thousand a year, because I should expect to give my whole attention to them, and it dropped at the end of three years. I might lose a great deal in the meantime; it might be in the nature of insurance. I should in such cases as that—not knowing how long—how many years—it would take, but beginning and working until it closed, although you might forecast somewhat the period of time—I should want seven or eight thousand dollars a year. I have had instances where I was offered a salary for prosecuting claims and declined it on those grounds. I was in 1882, or had been a long time——

Mr. MACKEY: I object.
Objection sustained.

Q. I would like you to give, as near as you can, in answer to the question, just what you would consider a fair compensation for the services of an attorney such as are mentioned in that question?

A. I would not undertake the service of that sort unless I had about seventy-five hundred dollars a year.

Q. Is that what you would regard as a fair and reasonable compensation for such services?

A. Assured of that salary, I should think it was fair compensation; but I want to confine it to myself; that I would not undertake it myself for less.

Q. I am asking you what you would consider a fair and reasonable compensation for the services named.

A. I should think that what I consider fair in my own case I would consider fair generally, because there are very few persons that can undertake these cases and prosecute them. A man's salary may be fully earned every year by the knowledge and skill he has acquired.

Cross-examination.

By Mr. MACKEY:

Q. Your answer to Mr. Bond's first question was without regard to the amount of work that the attorney did in the cases after the other attorney had retired, was it not?

A. I should consider I had to go over the whole case as a new field, and that is not a little thing. There may have been supplied a good deal of evidence, and the little that remains to be prosecuted might be the most difficult and on which the whole matter turns. That is my experience in the matter.

Q. It would depend altogether on the amount of work he did after the attorney had retired—after his associates had retired—
from the case, would it not?

292 A. I should not undertake the service on any such condition.

Q. It is not what you would undertake, but you have stated that where two attorneys were prosecuting a case and one retired, that when the case was finally decided and the amount collected that the prosecuting attorney should have three-fourths of the fee and the retiring attorney one-fourth. I ask you if that estimate of yours is not regardless of the amount of work which remained to be done in the case after the attorney retired?

A. It would be wholly independent of the consideration whether there was more or little to be done in the one hundred and seventy cases.

Q. Your answer, then, would not depend altogether upon that?

A. My answer would not depend upon the question you put; it would simply depend upon the number of cases, the fee that was to be received; and whether there was more or less evidence to be supplied, greater or less labor to be performed, would not touch that question. I should presume there was a good deal of work to be done in matter of that sort and you would not be governed by that; you would simply take them as they were and prosecute them to your best judgment and take the fee; otherwise there would be no end in the settlement.

Q. And that is what you mean when you answer Mr. Bond's question—when you answer Mr. Bond's hypothetical question, your answer is summed up in the answer you have just given, is it not?
A. It is.

Mr. Bond announces his evidence closed in chief.

Mr. BOND: We call upon the complainant to render an account of the fees received by him since the dissolution of the firm, any business that belonged to the firm at the dissolution of the partnership, that we may be given credit therefor.

Adjourned to May 21, 1895.

CUMMINGS
vs.
BAKER.

MAY 21, 1895.

Hearing pursuant to adjournment.
Present: Mr. Mackey, Mr. Claughton, and Mr. Bond.

HORACE S. CUMMINGS, having been first duly sworn, testifies as follows:

By Mr. MACKEY:

Q. The defendant has called on you to render an account of the fees received by you since the dissolution of the firm in any business that belonged to the firm of Cummings & Baker at the dissolution of the partnership; will you state now what fees you have received since the dissolution of the firm in business belonging to the firm?

A. I have received no fees on account of any business in
293 which Cummings & Baker had any connection, either directly or indirectly, since the dissolution of the firm. There are two items which I will name, one of which, under the decree of the court, I must account for, namely, the fees arising from the Cook estate; the other case was that of Isaac G. Baker, which was a case which was in my hands during the partnership, but in which I held no agreement or power of attorney, other than a mere letter from the clients. That case I carried in the departments as far as it could be carried and it was defeated. They asked me if the case should go to the Court of Claims and I said, Yes. I thought it was a good case for the Court of Claims, but as I did not wish to go into the Court of Claims, on their advice I turned the claim over to Mr. Mackey as an attorney, they making a contract with Mr. Mackey and giving him powers of attorney. Mr. Mackey took the case as filed in the Court of Claims and prosecuted it to a successful conclusion, receiving the fee from them, and at its conclusion he gave me his check for one-third of his fees, which was about seven hundred dollars. Whether that case can rightly be called one of the cases pending and in which the firm of Cummings & Baker are entitled to an equal division of fees is a matter for others to decide.

Q. The petition in that case in the Court of Claims was filed, as you remember, in whose name?

A. I wrote the petition myself and filed it as attorney-in-fact and put the name- of Cummings & Baker as counsel.

Q. Was that before the dissolution or afterwards?

A. That was before the dissolution.

Q. Did you do anything under that petition after filing it?

A. Nothing.

Q. And then you turned the case over to Mr. Mackey?

A. I did.

Q. And Mr. Mackey made a contract, as I understand you to say, with the claimants?

A. He did

Q. There were some cases set out in the bill of particulars in the lawsuit; have you any reference to those?

A. None whatever. Mr. Baker and I agreed in regard to those cases in regard to the fees due to him and the fees due to me, and in the final agreement, in regard to those fees, there was an amount due to him of some twenty-seven hundred dollars, and that he claims credit for in his account and which I admit.

Q. Now, in regard to the Cook assignment, what have you to say in regard to that?

A. In October, 1884, Mr. Cook, or Cook & Co., became insolvent; they were owing me individually and as a firm a large amount of money. They asked me to take the assigneeship, which I at first refused, but at the request of some friends of Mr. Cooke I consented. I did this with a view of making good some of the losses that I had sustained, in hopes that I might recoup myself in that way.

Q. What was that debt?

A. Money that was due me by the bank and money that was due me by Mr. Cook individually.

294 Q. And the amount?

A. The amount was somewhere about fifteen thousand dollars. The assignment was made to me on the 23rd of October, 1884, which, after the usual provisions of such instruments, provided, first——

Mr. Boxd: I object to the witness stating what the assignment provided.

Counsel for Mr. Cummings offer the original assignment in evidence. (Filed and marked Exhibit H S. C. No. 1.)

Q. What is the provision of the assignment to which you wished to refer?

A. (Reading from the assignment:) The first provision, which is: "The expenses of said sales and collections and the necessary expenses of preparing and executing this trust, including a commission of five per centum upon the amount of said sales and collections for his services in the discharge of this trust." I collected, amounts from sales and from debts due the firm, the sum of $104,977.71. I will say that when I took this deed of assignment

of the Cooke estate I did not expect or think that it was to form any part of the partnership business, because it was——

Mr. BOND: I object to what the witness expects, and because this is not in response to any question. I object to the tenor of the testimony now being given.

Objection sustained.

Q. State what fees you received.

A. I have not received any fees.

Q. What reason have you for not having received any fees?

A. The reason that I was misled by the representations of certain persons interested to see me through with the assignment that what I did would be made all right, meaning by that that my services would be paid for, and on that ground I devoted all the collections and sales to the liquidation of the debts due by Cook & Co. I should have collected these fees as the amounts were received, but I did not, relying upon the representations of other people, and for that reason I did not receive any.

Q. You have not been paid your debt?

A. I will say that I have been paid my debt from the bank the same as the other creditors, but not the debt as to the services rendered in winding up the estate.

Q. What were the representations made to you, Mr. Cummings, and by whom?

Mr. BOND: I object to the question as to the representations made to him.

Objection sustained.

Q. Will you state whether you rendered a greater or less amount of work in these inspector cases after the 6th of September, 1886, than you did before? It has been claimed by Mr. Baker that you did not do as much work in the cases after that date as you did before. Will you state what your understanding of the matter is?

295 A. I did fully as much work subsequent to September 6, 1886, in the inspector cases as I did at any time during several years before. In fact, I did more, for the reason that Mr. Baker was absent from the office more than he had been previous. In 1887, I think, Mr. Baker was absent from the office several months, taking a long trip from the East to the Pacific coast and to Alaska and down the California coast as far as San Diego, and returned home by that route, and during that time I had to answer the usual letters of inquiry from the many clients wishing to know the situation of their claims, and to give them such information I was obliged to go — the Treasury Department in order to get that information, which, had Mr. Baker been there, he could probably have given them at once. I know that in the matter of the inspector cases I did all the work that I was asked to do, was called on to do, although at the time I was under the impression——

Mr. MACKEY: You need not state your impressions about it.

Witness continues: And for a further answer to the question I refer to the depositions already on file given by me.

Cross-examination:

By Mr. BOND:

Q. Did you not include the claim of Isaac G. Baker in your schedule of cases belonging to the firm and under your charge in the schedule filed by you in this cause, marked H. M. B. No. 5?

A. I did. I included the claim of Isaac G. Baker in there through mistake, and I have stated the circumstances here just as they occurred, to the best of my ability and recollection.

Q. Do you know what fee was collected in that case?

A. I do not.

Q. Did you not state just now that you got one-third of the fee?

A. I received one-third of the fee, which, I think, was about seven hundred dollars.

Q. One-third?

A. Yes; it might be either more or less.

Q. Did you consult Mr. Baker in regard to turning that case over to other attorneys?

A. I did not.

Q. Why did you not consult him in the matter?

A. Simply because I had no contract with Isaac G. Baker myself.

Q. Mr. Baker had no contracts in a great many cases that he had?

A. I never knew him not to have; he generally had an iron-clad contract, and if he did not have a contract it was contrary to his custom.

Q. I mean in September, 1886, he had no contracts, had he, in a good many cases that he collected?

A. He may not have had a contract in some of the cases that he subsequently collected, but he had a contract for them at one time or another, but I never had any contract in the Baker case.

Q. In regard to these other cases included in this schedule,
296 Exhibit H. M. B. No. 5, are there any other cases still pending—any of these cases still pending?

A. All of these cases are in the same condition now as they were when I filed this instrument, as far as my knowledge goes, and I will say that my relations to the claims are the same now as they were then; no rights have been disposed of by me.

Q. Has Mr. Baker ever declined to render any service that you have called upon him to render in any of these cases under your charge undisposed of?

A. Never.

Q. In speaking of the amount you collected under the assignment of Cook & Co. to you, do you mean that was the amount you collected in money?

A. That is the amount of sales and collections in money.

Q. In money?

A. Yes, sir.

Q. Did you collect or receive anything else for the firm than money under this assignment?

A. I did not.

Q. Did not take any securities?

A. No, sir.

Q. Or assets or bonds or stocks of any kind?

A. I did not.

Q. Did you use any such assets in payment of the debts of the firm?

A. I did, and it was done in this way——

Q. To what extent or amount?

A. I could not say, simply because a large amount of these assets were held by creditors of the firm as collateral—a large amount of them—and I made what I considered an extremely good trade by surrendering to the creditors the collateral, they relinquishing their claim.

Q. And that was in effect the same as if you had made a sale of those assets and out of the proceeds of such sale paid the creditors?

A. ——.

Mr. MACKEY: I object; that is a question of law.

Objection sustained.

Q. Then, as I understand you, when the creditors of the firm held assets of the firm, consisting of bonds or stocks and choses in action and property of that kind, you made a settlement with them by disposing of those assets to them in payment of the indebtedness, did you?

A. I did.

Q. And is the amount of those assets included in the amount of the sales and collections that you have given?

A. The greater part are included in that. For instance, when the firm failed and a person would be a debtor to the firm of H. D. Cooke & Co. in a certain sum, and to secure that debt he pledges certain collaterals, all of these collaterals and the notes were rehypothecated by Cook & Co., mostly with the Metropolitan
297 bank. After the failure the debtor would come and offer his money to take up his note and to pay off the debt, principal and interest. I, of course, was obliged to deliver it to him on the payment of the note, principal and interest, so I would take up the amount to the Metropolitan bank and pay the Metropolitan bank, and deliver the collateral and note back to the debtor of the firm, and in that way there is a large amount of that included in the sum collected by me.

Q. How much is so included?

A. Well, I could not say, but they were all collections.

Q. Now, where assets of the nature above mentioned belonging to H. D. Cook & Co. were held by their creditors as collateral, did you settle with those creditors in certain instances by their taking these collaterals at an agreed price?

A. I did.

Q. Is the amount of the collaterals thus taken by the creditors in settlement included in the amount that you have given, $104,977.71?

A. Almost all.

Q. How much money did you collect in the course of your administration as assignee?

A. The amount stated there.

Q. Did you collect that money?

A. I collected that money.

Q. How do you make it out that you included the collaterals which the creditors took in the payment of the indebtedness to them?

A. By entering it up on the account.

Q. Can you make up a statement of the amount that was and that was not included in the assets mentioned?

A. I could not.

Q. Have you made a final settlement of your account as assignee?

A. I have not.

Q. Have you rendered an account or made a statement to the creditors since the date of the one filed in this cause, the printed one?

A. I do not know which one that is.

Q. Since the one printed in this record on page 112.

A. I do not know whether I have or not. I know I have sent out letters to different people who inquired about the condition of the estate, but as the creditors are now reduced to none I am not troubled with that question.

Q. There are no remaining creditors of H. D. Cook & Co.?

A. There are no creditors of the estate except those who—all have received their fifty cents on the dollar. There are no creditors of the estate except some personal friends of Mr. Cook, who will not relinquish the balance, but say they will never make any trouble, provided no more money is collected, though I think possibly there may be some additional sums collected in the future.

Q. Have you included in the amount given by you of sales and collection the amount secured or collected from or through Mr. Cook personally?

298 A. What do you mean?

Q. The interest in the Washington and Ohio Railroad Company.

A. Certainly, they are all included in the sum mentioned by me.

Q. That is included?

A. Yes.

Q. What amount is included for that interest in the Washington and Ohio R. R. Company?

A. Somewhere in the vicinity of, I should say, from thirty-three to thirty-five thousand dollars. They consisted of bonds of the Washington, Ohio and Western railway that I sold on a- average with no coupons, all defaulted bonds, for about 72 cents on the dollar, and today the interest is paid, and the bonds are guaranteed, and the last sales in New York are 73 cents on the dollar.

Q. You sold that?

A. I sold them. The First National Bank of New York were the ultimate purchasers of it.

Q. Did you include in that amount the amount received in any way from the assets of Cook & Co. in Florida?

A. I did, portion of them, but portions of those amounts have not been realized on yet.

Q. Do you hold any interest of Cook & Co. in property in Florida?

A. I do.

Q. To what amount?

A. I could not state what the amount is, only whatever there is there is for Cook & Co., as I believed it was better in that form than on securities which are worth nothing on the market today.

Q. Do you hold any of these Florida assets in your own name?

A. There are some in my name which I hold for the estate.

Q. What amount do you hold in your own name for the estate?

A. Well, there is—I could not tell you either the nominal or real amount, but I think there is in the vicinity of about 3,300 acres of ground in St. Johns county.

Q. Anything else?

A. One hundred and twenty shares of the canal stock.

Q. That is called what?

A. The East Coast Line Canal Company?

Q. What is the nominal value of those shares?

A. One hundred dollars.

Q. Are they in your name?

A. They stand in my name as assignee.

Q. How does the title stand?

A. Stands in the name of H. S. Cummings.

Q. Why didn't you take that in your name as assignee?

A. I could have done it just as well as not. I am responsible for it as assignee.

Q. Didn't you take it and don't you hold it as a part of your fees or as a guarantee of your fees?

A. I took it with the hopes of making my fees, but not as my fees.

299 Q. You hold it, then, for the purpose of assisting you in making your fees?

A. Exactly so.

Q. Are there any other assets of that firm in Florida except what you have named?

A. None others that I know of.

Q. Do you hold any other property in your own name that belongs to the estate of Cook & Co.?

A. Not that I know of.

Q. When you made the report on page 112 of the printed record in this cause you stated that at that time you had reduced the indebtedness of the firm of Cook & Co. to the amount of $101,052.34 and of the unsecured indebtedness $53,467.34, and that the estate is worth more today than at the date of the failure. Have you not sold any of the assets or collected anything for the estate since that time?

A. Yes.

Q. Can you tell to what amount?

A. I cannot now. I would like to say, in explanation of that, that the settlement of H D. Cook & Co.'s indebtedness was accomplished in a great degree by friends of Mr. Cooke; for instance, his partner in Utah, Mr. Kendall, sent him twelve thousand dollars to take up certain claims. One other gentleman came forward and advanced eight thousand dollars and took Mr. Cook's personal obligation. Mr. J. Cooke, of Philadelphia, contributed quite an amount of money. Mr. Cook himself made a good deal of money and turned it in to pay many of these debts. He only paid one last week, in order to make up the fifty per cent.

Q. Did you include that in the amount of collections stated by you?

A. I did not, because I would be entitled to no fee for that, and it was money that was voluntarily advanced by his friends and relatives.

Q. What do you say the amount was?

A. I could not state now, but I would say the amount was from eighteen to twenty thousand dollars that was advanced by Mr. Cook's partner and his relatives and friends,

Q. When do you expect to close your business as assignee of Cook & Co.?

A. When I get all the creditors satisfied.

Q. You say that when Mr. Baker was absent in 1887 you assisted him in replying to claimants. Did you do that voluntarily?

A. I answered the letters of inquiry and what other work I did on the same principle that I had always done what work I could; that Mr. Baker would naturally do when he was not absent.

Q. To whom were those letters addressed?

A. To different clients of Mr. Baker.

Q. The letters that you answered, to whom did they come addressed?

A. To Cummings & Baker, as a rule.

300 Redirect.

By Mr. MACKEY:

Q. Have you been paid all your debt by the firm of H. D. Cook & Company and by Mr. Cook individually, owing you at the time of the assignment?

A. I hold Mr. Cook's obligations and note now to the extent of some seven thousand dollars.

Q. Have you any other security for that obligation than the assets of the assignment?

A. The assets of the assignment are not in any way applicable to Mr. Cook's personal obligations.

Q. Then this obligation that you hold of Mr. Cook is his personal obligation?

A. His personal obligation.

Q. For the debt he owed you at the time of the assignment?

A. At the time of the assignment.

By Mr. BOND:

Q. When did you take his note and obligations?

A. It is a remnant of a debt that Mr. Cook owed me in about 1888, of eighteen thousand dollars of loaned cash, and which had been reduced from time to time until it now amounts to between six and seven thousand dollars.

Q. Do you mean that you hold the original obligation given you before the assignment, or do you hold his notes and obligations taken since the assignment?

A. The notes that I hold are the renewals of the same debt.

Q. Those that you now hold were given you since the assignment?

A. The present ones I hold?

Q. Yes.

A. They were given since the assignment.

Q. How recently?

A. I think the last was given me about four years ago, and the old ones torn up, new ones given.

Q. And these notes and obligations you just speak of are in addition to the lands that you named and the other assets?

A. This has nothing to do with the Cook & Co. assignment. It is the personal obligation of Mr. H. D. Cook.

By Mr. MACKEY:

Q. Has the bank debt been paid?

A. I have been paid my debt due by the firm of H. D. Cook & Co. as a firm the same as the other creditors.

Q. And the other creditors were paid fifty per cent. and released?

A. I was paid in full because I was made one of the preferred creditors, of which there is a list in the deed of assignment.

301 CUMMINGS vs. BAKER.

MAY 29, 1895.

Hearing pursuant to adjournment.

Present: Mr. Claughton and Mr. Mackey for the plaintiff, and Mr. Bond and Mr. Worthington for the defendant.

JOHN G. LONG called by Mr. Bond.

JOHN G. LONG, having been first duly sworn, testifies as follows:

By Mr. BOND:

Q. Please state your residence and occupation.

A. I am a resident of Florida and a lawyer by profession.

Q. Where have you resided in Florida, and for how long?

A. I resided at St. Augustine, St. John's county; have been a resident of that county about thirty two or thirty-three years, I think.

Q. Do you own lands in that county?
A. I do.
Q. Have you bought and sold land there?
A. I have from time to time.
Q. Are you familiar with the values of land in that county?
A. Well, I used to be. I have been absent from there a good deal for the last eight or ten years, and I am not as familiar now as formerly, but I am somewhat familiar now with the land in a general way.
Q. Have you any knowledge of the lands located in that county by Mr. H. S. Cummings or his agent paid for by bonds of the Florida Coast Line Canal Transportation Company? And, if so, please state their general location and what you know of the location, of locating them.
A. I can only say in a general way that I know of Mr. Cummings purchasing lots in St. John's county some years ago—possibly eight or ten years ago. I am not sure, however, as to the exact time, and I do not know that I could give the exact location or specific description of these properties. I am not sure that I can even recognize from the numbers and descriptions as by legal subdivisions any of these properties at present.
Q. How were they purchased and located?
A. I do not know that.
Q. I mean with what were they located and paid for.
A. I can perhaps answer that in this way better: Mr. Cummings and Mr. Baker were in business together at that time, both of them; I think each of them about the same time asked me my opinion as to the advisability of converting bonds of this canal company into land and my opinion as to the same; lists, I think, were submitted to me, possibly, and I may have pointed out lands that were, in my opinion, more desirable, because some of these lands I knew, as I had seen them; others I did not know; I selected or suggested the purchased of what I knew of the lands in the locality, but as to how the transactions was closed, whether from my personal
302 knowledge they were paid for in bonds or cash, I could not state, not from my personal knowledge. I was under the impression, however——

Mr. MACKEY: Never mind; don't state your impressions.

By Mr. BOND:

Q. State whether or not Mr. Cummings said anything to you about this land.
A. I think it was by correspondence; whatever relations we had were brought about by correspondence. I do not know that during this time I had any personal interview with Mr. Cummings, in relation to it; I am not sure as to that.
Q. Will you state what valuation was placed upon these lands as locatable or purchaseable with the bonds of that company?

Mr. MACKEY: I object.

A. I know that I remember—it is not fresh in my mind—the board of directors fixed a schedule of values of the lands belonging to the corporation from five to fifteen dollars; that is my recollection; I would not be positive as to the limit either way, but I think, as I remember it now—I think they were scheduled from five to fifteen dollars.

The AUDITOR: Five to fifteen dollars an acre?

A. Yes; an acre.

By Mr. BOND:

Q. State whether or not that was the value payable in cash or bonds.

A. As I remember, it was in value payable in cash or bonds.

Cross-examination.

By Mr. CLAUGHTON:

Q. Were the bonds worth par?

A. I do not know as to the value of the bonds; I have no means of knowing that.

Q. How do you know the directors had made out that schedule?

A. Well, I was familiar with the officers: I knew the officers of the corporation very well; was familiar with their business there; I knew that in a general way, perhaps from the fact that I purchased some of the lands myself.

Q. You say you knew it in a general way; did you know it because the officers told you?

A. Yes; Dr. Westley told me; he was president of the corporation.

Mr. CLAUGHTON: I object to this as not competent proof.

By Mr. BOND:

Q. Where did you take up lands—in that county? Did you take them up in St. John's county?

303 A. Yes. I purchased a very little, and I am unable at this time to tell you what I paid for them.

Q. Did you take them up with bonds of this company?

A. No; I paid cash.

Q. Can you approximate, from your recollection, what you paid for them in cash?

A. No; I cannot. I can only say, as I remember, from five to fifteen dollars.

Mr. MACKEY: I object.

Q. Were the lands of this canal and transportion company that you took paid for in bonds or not?

A. I think, as I remember it, I did not buy direct, either, from the company. I bought through Samuel J. Maddox or from some friends of his who had purchased the lands of the canal company, and I took them at the price they paid. Possibly they were paid for in bonds. I am not sure, but I want to correct my testimony

in that respect. I don't think I bought any land direct from the company.

Q. The lands were originally bought from the company?

A. Bought from the company.

Mr. CLAUGHTON: I ask that this testimony be stricken out as irrelevant and immaterial.

Mr. BAKER recalled by Mr. Bond.

By Mr. BOND:

Q. You have heard the testimony of Mr. Cummings at the last session in regard to the assistance rendered by him to you in matters pertaining to the inspector cases during your absence from the city in 1887. I will ask you to state what his assistance consisted of and how long were you absent.

A. I heard Mr. Cummings' testimony on that subject. I went away in June—the latter part of June—and returned in the early part of September. During that time no pending case was allowed, rejected, or advanced. No action whatever was taken upon the cases. Upon my return Mr. Cummings handed me a package of not exceeding twenty letters, which he said he had replied to. They were simply letters of inquiry, and the general character of the replies as he stated to me were that the cases were pending and would be taken up in the usual order; or, if more specific information was asked, he informed them that Mr. Baker would reply on his return. That was the only service Mr. Cummings rendered.

Q. State whether or not you rendered Mr. Cummings any service or assistance in the matter of the Cook assignment.

A. He frequently consulted me in matters pending that assignment, and when people came in when he was absent from the city or absent from the office I gave them general information on the subject and generally satisfied them, and I assisted him somewhat in the preparation of the papers which he used in the matter.

Q. Do you know Mr. John C. Bullitt, of Philadelphia, re-
304 ferred to by Mr. Cummings in his testimony in this cause on page 67 of the printed record?

A. I have met him several times.

Q. Will you state, if you know, his profession and any specialty he may have in the line of his profession and his standing?

A. He is a lawyer by profession and makes a specialty of corporation business, settlement of assignments of corporations, and receiver's work generally, and I understand and believe he is a recognized authority on those points throughout the U. S.

Evidence closed.

Adjourned subject to notice.

EXHIBIT H. M. B. No. 1.

Before the auditor.

In the Supreme Court of the District of Columbia.

CUMMINGS v. BAKER. } Eq. No. 12263.

Statement of Account by Henry M. Baker (under Decree).

He charges himself with fees in inspector cases as follows:

1886.	As per Exhibit H. M. B. No. 3. Printed Record, Court of Appeals, p. 176, &c.....	32,977 51
"	In case of J. L. Mallory, Record, p. 179.....	400 00
"	" D. O. De Wolf, " "	443 14
1888.	In cases paid during this year	64,823 24
1889.	" " " & prior to dissolution of firm, Sept. 1, '89, Record, p. 2.....	6,353 68
	2)	104,997 67
	One-half of above =.....	52,498 83

He admits that after the final dissolution of the firm he collected fees as follows:

Case of Silas T. Soule.....	$300 93
" Wm. H. Sentell	265 55
	$566 48

The power of attorney in Soule's case is dated Feb. 25, 1889. The claim was allowed Oct. 10, 1889, and paid in Oct., 1890.

The power of attorney in Sentell's case is dated July 30, 1889. The claim was allowed Oct. 11, 1889, and paid in Oct., 1890.

The work in these two cases was principally done after the dissolution of the firm, and it is claimed that they should not be included among the cases for which Mr. Baker is accountable;
305 but should the auditor decide otherwise, then he claims an allowance as compensation for services in their collection, rendered after the dissolution, of $\frac{1}{3}$ of the amount.

NOTE.—No fees were collected in cases of Jesse Babcock, 1886, and Samuel E. Barr, 1888.

He claims credit as follows:

1886.	By amount paid other attorneys, as per Exhibit H. M. B. No. 3, Record, p. 180, "No. 7"	1,488 81
"	By amount paid Goodelle & Nottingham, attorneys, in suits for fees in cases of De Wolf and Babcock	150 00
"	By amount paid for stationery, postage, and typewriting in inspector cases (estimated)	150 00
"	By amount paid for services before Congress and elsewhere in connection with these cases	1,075 00
"	By amount paid Sarah A. Lathim for clerical work in same	200 00
"	By amount paid expenses in taking testimony in suits for fees in cases of De Wolf and Mallory (estimated)	40 00
1887 & 1888.	By amount paid associate attorneys as their share of fees in cases collected during these years	1,061 68
"	" amount paid for clerical services	75 00
"	" " " stationery, postage, and typewriting (estimated)	225 00
"	" amount of expenses (estimated) on business trips relative to inspector cases, viz:	
	At Burlington, Vt. $45	
	" Westerly, R. I. 30	
	" New Haven, Conn. 25	
	" New York (twice). 40	
	" Philadelphia 10	
		150 00
	By amount brought forward	
1887–'8.	By amount paid Wm. E. Perry for services in New Jersey, inspector cases	75 00
" " "	paid expenses in taking testimony in suits for fees in cases of Peale and Baird (estimated)	40 00
" " "	paid attorney in suit for fees in case against Wm. Baird	193 58
306		
1887–'8.	By amount paid Geo. C. Lewis in certain Vermont cases	100 00
" " "	paid for services before Congress & elsewhere in inspector cases	2,000 00

1889.	By amount paid associate attorneys as their share of fees.....	669 94
" " "	paid for stationery, postage, and typewriting (estimated).....	50 00
1886–'7. 1888–'9.	By amount due H. M. Baker for personal services in obtaining, prosecuting, and collecting inspector cases, being the difference between ⅓ and ⅓ of the net fees, see complainant's testimony, Record, p. 56, &c.....	16,212 29
"	" one-half of the fees and commissions received or which should reasonably have been received by H. S. Cummings by reason of the assignment of H. D. Cook & Co. to him, Record, p. 67.....	7,500 00
	By amount brought forward.....	
	" amount due from said Cummings as per account stated and sued for in suit of Baker *vs.* Cummings, at law, No. 30197, Record, pp. 5, 6, 102, &c.....	2,712 81
	" interest on the same.....	
	" amount paid Cummings Sept. 6, 1886, in purchase of his interest in inspector cases, Record, pp. 4, 95, &c.....	15,000 00
	" one-half of fees in cases and business taken by said Cummings during the existence of the partnership, but not settled at the time of its dissolution, and concerning which he should account.....	

Interest on said several items claimed as credits.

DISTRICT OF COLUMBIA, *ss:*

Henry M. Baker came personally before me, and, being duly sworn, deposes and says that the foregoing account as to receipts and disbursements is just and true according to the best of his knowledge and belief; that he is able to state the receipts accurately and has so stated them by reason of his having kept an account of the same in connection with the settlements made by him with his clients, the claimants; but he is unable to state the disbursements for expenses with the same accuracy for the reason that, believing all the proceeds of the inspector cases to be his individual
307 property after the settlement in 1886, he paid many of them from cash in hand, for which he took no vouchers and of which he kept no record. He is sure, however, that the amount disbursed by him in obtaining, prosecuting, and collecting said inspector cases exceeds by a considerable sum, which he is now unable to specify, the amount stated in said account.

As to the items of credit claimed other than for disbursements for expenses, he believes them to be just.

HENRY M. BAKER.

Subscribed and sworn to before me this 2d day of February, 1895.

WM. M. SMITH,
Notary Public. [SEAL.]

It is hereby stipulated and agreed that the foregoing transcript of the account of Henry M. Baker, filed with the auditor and accidentally omitted from the transcript of the record heretofore filed in the Court of Appeals and printed, may be now filed as a part of the transcript in this case and inserted at page 38 of said printed record.

S. R. BOND,
Solicitor for Defendant (Appellant).
FRANKLIN H. MACKEY,
Solicitor for Pl'ff, Appellee.

(Endorsed:) No. 565. Henry M. Baker, appellant, *vs.* Horace S. Cummings. Additions to record per stipulation of counsel. Court of Appeals, District of Columbia. Filed Apr. 9, 1896. Robert Willett, clerk.

MAY 29, 1895.

Hearing pursuant to notice.

Present: Mr. Claughton and Mr. Mackey for the plaintiff, and Mr. Worthington and Mr. Bond for the defendant.

Mr. Bond proceeded to argue the matters involved in the reference on behalf of the defendant and the account submitted by him.

Mr. Mackey and Mr. Claughton submitted their oral arguments in support of the objections to the said account, and Mr. Worthington proceeded with the closing argument in behalf of the defendant, pending which the hearing was adjourned to the 30th of May, at 10 o'clock a. m.

MAY 30, 1895.

Hearing pursuant to adjournment.

Present: Mr. Claughton and Mr. Mackey for the plaintiff, and Mr. Worthington and Mr. Bond for the defendant.

Mr Worthington closes his argument and the matters of the reference are submitted.

308 *Amendment to Defendant's Account Submitted to the Auditor.*

EXHIBIT H. M. B. No. 1.

In the Supreme Court of the District of Columbia.

CUMMINGS v. BAKER. } Equity. No. 12263. Before the Auditor.

The defendant amends his account heretofore filed as to the item of $16,212.29, for *which credit* is therein claimed by substituting therefor the following, viz:

By amount due the defendant for personal services in obtaining, prosecuting, and collecting inspector cases subsequent to September 6, 1886..... $42,700

EXHIBIT H. M. B. No. 2.

List of Inspector Cases Suspended at Date of Sale, September 6, 1886, Yet Subsequently Allowed and Paid.

Names.	Amount allowed.	Fee collected.
John X. Miller	$1,567 50	$391 87
S. W. Hall	1,443 74	360 93
Joseph Taber	2,608 58	652 14
George F. Sisson	3,329 02	832 25
J. H. Holmes	2,126 70	265 84
Thomas Hurst	2,127 00	531 75
Catherine Sweeney	2,099 00	524 75
Benjamin Predmore	1,015 32	253 83
David S. Beetle	3,698 53	924 63
Charles S. Peale	2,392 50	350 00
Henry W. Gadding	4,735 98	1,183 99
H. A. Ashmore	122 00	30 50
Wm. J. Alden, Jr	4,148 52	1,037 13
Joseph S. Drew	4,458 89	1,114 72
Stephen Holmes	1,289 13	322 28
Levi B. Downs	497 90	124 47
Thomas F. Usher	744 00	186 00
Totals	$38,404 31	$9,087 08

309 EXHIBIT H. M. B. No. 3.

List of Inspector Cases Secured by Mr. H. M. Baker, the Defendant, After Date of Sale, September 6, 1886.

Names.	Am't allowed.	Fee collected.
Sarah A. Singer	$1,035 00	$258 75
Edward A. Thomas	148 32	37 08
Eliza L. Foxwell	1,448 07	362 02
W. H. H. Soule	1,203 72	300 93
George Matthews	190 00	47 50
S. P. Millington	63 00	15 75
Remos Wells	156 15	39 04
H. H. Parmester	143 58	35 89
Edwin R. Bell	1,666 32	333 26
W. S. P. Garvin	1,989 28	497 32
Wm. C. Cathcart	594 25	148 56
Silas P. Carpenter	365 80	54 87
Harrison Southworth	2,875 94	718 98
John H. Butler	907 71	226 93
Charles Johnson	2,263 65	565 91
Edward L. Wright	1,151 11	287 78
B. W. Thompson	93 00	23 25
John C. Gram	360 00	90 00
Edward Wilkinson	248 37	62 09
Samuel S. Fifield	749 65	187 41
Adrian C. Dodge	91 50	22 87
Henry Shortle	945 75	236 44
Gould D. Jennings	5,663 68	1,415 92
J. H. Brooks	649 07	162 27
J. H. Johnston	1,662 09	415 52
Silas G. Bean	526 84	105 37
George C. Merrill	201 00	40 20
	27,392 85	6,691 91
Amount brought forward	27,392 85	6,691 91
Wm. H. Woodbury	310 50	77 62
T. W. Dickinson	993 00	124 12
Lyman H. Smith	877 50	131 62
F. A. Hooke	661 50	165 37
Z. Sharper	699 66	174 91
S. H. Newton	63 07	15 77
G. P. Kingsbury	1,462 87	365 72
Joseph F. Field	404 29	101 07
S. H. Laskey	2,484 00	372 60
Wm. E. Stewart	1,532 15	383 04

Exhibit H. M. B. No. 3—Continued.

Names.	Am't allowed.	Fee collected.
310 Benj. C. Moore	159 00	23 85
Lewis M. Barrett	3,193 70	798 42
F. B. Pillsbury	1,699 77	400 00
J. G. Reynolds	120 97	30 24
H. B. Pettingill	411 00	102 75
Thomas E. Morris	2,699 33	674 83
Henry Call	687 00	171 75
David C. Welsh	1,459 05	364 76
Samuel Butler	3,063 37	765 84
A. B. Riford	1,436 03	359 00
Benedict Yost	292 50	73 12
Charles T. Wickes	1,461 65	365 41
Henry Hooker	585 04	146 26
B. C. Dearborn	207 00	51 75
Henry M. Newcombe	2,996 68	299 66
Phillip H. Paine	1,682 93	420 73
W. W. Oliver	769 58	192 39
Thomas J. Ramsdell	2,406 87	601 72
	62,212 86	14,446 23
Amount brought forward	62,212 86	14,446 23
Wm. H. Sentell	1,062 21	265 55
James W. Edloe	106 63	26 66
Annie M. Hopkins	1,585 47	396 37
No. of cases, 58.		
Totals	64,967 17	15,134 81

Assignment.

EXHIBIT H. S. C. No. 1.

This indenture made this twenty-third day of October, A. D. 1884, between the firm of *H. D. Cooke & Co.* (composed of Henry D. Cooke and Allen G. Campbell) of the first part, and *Horace S. Cummings* of the second part, both of the city of Washington, in the District of Columbia.

Whereas the firm of H. D. Cooke & Co. are indebted to various persons dealing with said firm in various amounts, and whereas said firm are unable to pay and discharge the said indebtedness with punctuality and are desirous of securing the same and making distribution of the assets of said firm.

Now therefore this indenture witnesseth, That the said party
311 of the first part for and in consideration of the premises and further the sum of five ($5) dollars paid by the said party of the second part at and before the sealing and delivery of these presents the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, released, conveyed, and set over and by these presents *do* grant, bargain, sell, alien, enfeoff, release, convey and set over unto the said Horace S. Cummings, his heirs, executors, administrators, and assigns, *all* the assets of said firm of whatsoever kind or nature, and all the estate real or personal belonging to the said firm or in which they have any interest, of whatsoever kind and wheresoever situated, and all claims held by said firm against any person or persons and all debts due to said firm.

To have and to hold said assets and estate and claims and debts, unto and to the use of the said party of the second part his heirs, executors, administrators and assigns in and upon the following trusts. That is in trust to take immediate possession of all and several the said above-mentioned assets, and as soon as convenient thereafter sell said real and personal estate upon such terms and in such manner as to the said party of the second part shall seem best for the interest of all parties concerned and upon payment of the purchase-money convey and assign such real and personal estate to the purchaser or purchasers; and to collect the proceeds of such sale or sales: Also to collect all claims held by said firm, and all debts due to said firm—and in the collection of such debts and claims the said party of the second part is authorized to bring and prosecute such actions or suits at law or in equity as to him may seem necessary and proper. *And* from the proceeds of such sales and collections, the said party of the second part shall pay—*first*—the expenses of said sales and collections, and the necessary expenses of preparing and executing this trust, including a commission of five per centum upon the amount of said sales and collections for his services in the discharge of this trust. *Second*—the sum of fourteen thousand ($14,000) dollars to *Charles Payson*, the sum of fourteen hundred ($1,400) dollars to *J. H. Voorhees*, the sum of ten thousand ($10,000) dollars to the *Chesapeake and Potomac Telephone Company* and the sum of twenty-five hundred ($2,500) dollars to *Horace S. Cummings* and the sum of six thousand ($6,000) dollars to *Henry D. Cooke*, trustee or such sums as may be due to the said above-named parties by said firm, as will appear from their accounts on the books of said firm, in full if sufficient money comes into his hands from said assets, and if not then to pay the said-named parties *pro rata* upon the above amounts so far as said assets when collected will go.

Third. To pay all the other creditors of said firm in full if sufficient money comes into his hands from said assets, and if not then to pay the said creditors *pro rata* as far as said assets when collected will go—*Fourth* the remainder if any to pay to the members of the said firm, their executors, administrators or assigns, according to the respective interests of said members in said firm.

312 *In testimony whereof* the said party of the first part have hereunto set their hands and seals on the day and year first above written.

H. D. COOKE & CO. [SEAL.]
HENRY D. COOKE. [SEAL.]

Signed, sealed, and delivered in the presence of—the words on the margin of page 3 interlined at line 17 of said page where indicated by # before signing—
L. S. FREY.

DISTRICT OF COLUMBIA, *To wit:*

I, L. S. Frey, a notary public in and for said District, do hereby certify that the firm of *H. D. Cooke & Co.*, party to a certain deed bearing date on the 23rd day of October, A. D. 1884, personally appeared before me, in my said District, by *Henry D. Cooke*, one of the members of said firm, and the said Henry D. Cooke, being personally well known to me to be one of the said firm of H. D. Cooke & Co., who executed said deed, acknowledged the same to be the act and deed of said firm of H. D. Cooke & Co. and also the act and deed of him, the said Henry D. Cooke, as one of the members of said firm.

Given under my hand and notarial seal this twenty-fourth day of October, A. D. 1884.

L. S. FREY, [SEAL.]
Notary Public.

[SEAL.]

Defendant's Exceptions to Auditor's Report.

Filed July 11, 1895.

In the Supreme Court of the District of Columbia.

HORACE S. CUMMINGS
vs.
HENRY M. BAKER. } No. 12263, Eq. Doc. 30.

The defendant excepts to the report of the auditor filed in this case on the 18th day of June, 1895—

First. Because the auditor has disallowed the defendant's claim for amount due him for professional services in obtaining, prosecuting, and collecting "inspector cases" subsequent to September 6, 1886, whereas he should have allowed the full amount of said claim—$42,700.

Second. Because the auditor, as to the defendant's claim against the complainant of one-half the fees and commissions received or which reasonably should have been received by the complainant by reason of the assignment of H. D. Cooke & Co. to him, has allowed only the sum of $2,624.44, whereas he should have charged the complainant with $15,000 on that account and should have allowed the defendant a credit of one-half that sum—$7,500.

Third. Because the auditor has charged the defendant with the

sum of $300.95 on account of the claim of Silas T. Soule, whereas he should have charged the defendant with nothing on that account.

313 Fourth. Because the auditor has charged the defendant with the sum of $265.55 on account of the claim of William H. Sentell, whereas he should have charged the defendant with nothing on that account.

Fifth. Because the auditor has disallowed the defendant's claim for compensation for his services rendered in collecting the claims of said Soule and Sentell, whereas he should have allowed the defendant a reasonable compensation for such services.

Sixth. Because the auditor has charged the defendant with interest on $27,350.09 from September 1st, 1889, to July 1st, 1895, amounting to $9,572.53, whereas he should not have charged the defendant with said sum or any part thereof or with any interest on account of said sum of $27,350.09.

Seventh. Because the auditor has charged the defendant with interest on $566.48 from October 30th, 1890, to July 1st, 1895, amounting to $158.60, whereas he should not have charged the defendant with said sum or any part thereof and should not have charged the defendant with any interest on said sum of $566.48.

A. S. WORTHINGTON,
S. R. BOND,
Solicitors for Defendant.

Exception of Complainant to the Auditor's Report.

Filed July 15, 1895.

In the Supreme Court of the District of Columbia.

HORACE S. CUMMINGS, Complainant,
vs.
HENRY M. BAKER, Defendant.
} No. 12263, Equity Docket 30.

Exceptions by the complainant, Horace S. Cummings, to the report of the auditor filed herein June 18, 1895.

The complainant excepts to so much of said report as allows to the defendant, Henry M. Baker, the sum of $2,624.44, being one-half of commissions alleged to have been received or which it is alleged should have been received by said Cummings under the deed of assignment from H. D. Cook & Company, as set forth in said report of the auditor, because the complainant says that nothing should be allowed the said defendant, Baker, on account of said assignment from H. D. Cook & Company.

FRANKLIN H. MACKEY,
H. O. CLAUGHTON,
Solicitors for Complainant.

314 *Decree Overruling Exceptions to Auditor's Report, &c.*

Filed February 17, 1896.

In the Supreme Court of the District of Columbia.

HORACE S. CUMMINGS
vs.
HENRY M. BAKER. } In Equity. No. 12263, Docket 30.

This cause coming on to be heard upon the exceptions of the plaintiff and defendant respectively to the report of the auditor filed herein on the 18th day of June, 1895, and counsel for the respective parties having been heard, and the said exceptions having been duly considered by the court, it is, this 17 day of February, A. D. 1896, adjudged, ordered, and decreed that the said exceptions of the plaintiff and defendant be, and the same are hereby, overruled, and the said report of the auditor be, and the same is hereby, in all things confirmed; and the plaintiff in open court now consenting to the defendant being allowed, in addition to the allowance made by the auditor to the defendant in the matter of the Henry D. Cook assignment, the further sum of four thousand eight hundred and seventy-five dollars and fifty-six cents ($4,875.56), it is therefore by the court further adjudged, ordered, and decreed that the plaintiff recover of the defendant the sum of thirty-two thousand seven hundred and seventy-two dollars and fourteen cents ($32,772.14), with interest thereon from the first day of July, 1895, until paid; also his costs, and that he have execution therefor as at law.

A. B. HAGNER,
Asso. Justice.

The defendant, Henry M. Baker, now, in open court, appeals from the foregoing decree to the Court of Appeals of the District of Columbia, and the penalty of his appeal bond, to operate as a supersedeas, is hereby fixed at fifty thousand dollars.

A. B. HAGNER,
Asso. Justice.

February 17th, 1896.

In the Supreme Court of the District of Columbia.

HORACE S. CUMMINGS
vs.
HENRY M. BAKER. } No. 12263. In Equity.

The President of the United States to Horace S. Cummings, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant

to an appeal allowed in the supreme court of the District of
315 Columbia on the 17th day of February, 1896, wherein Henry M. Baker is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 18th day of February, in the year of our Lord one thousand eight hundred and ninety-six.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 18 day of February 1896.

FRANKLIN H. MACKEY,
H. O. CLAUGHTON,
Attorneys for Appellee.

Memorandum.

1896, M'ch 2.—Bond for appeal filed.

Order to Make Up Record on Appeal.

Filed March 4, 1896.

In the Supreme Court of the District of Columbia, the 4th Day of March, 1896.

HORACE S. CUMMINGS
vs.
HENRY M. BAKER. } Equity. No. 12263.

The clerk of said court will please make up the record for the Court of Appeals according to the stipulation filed herewith, dated March 2, 1896.

S. R. BOND,
Attorney for Defendant.

Stipulation as to Record on Appeal.

Filed March 4, 1896.

In the Supreme Court of the District of Columbia.

HORACE S. CUMMINGS, Complainant,
vs.
HENRY M. BAKER, Defendant. } Equity. No. 12263.

An appeal having been taken by the defendant to the Court of Appeals of said District from the decree passed in this cause February 17, 1896, and a printed record in the cause having been filed in said Court of Appeals upon a former appeal by said defendant:

316 It is hereby stipulated and agreed that said printed record may be read and used upon the hearing of the appeal from said decree of February 17, 1896, and that said record, together with a transcript of the papers filed and the proceedings had before the auditor and the subsequent proceedings in this court, shall constitute the record for the hearing of the present appeal in said Court of Appeals.

H. O. CLAUGHTON,
FRANKLIN H. MACKEY,
Solicitors for Complainant (Appellee).
S. R. BOND,
Solicitor for Defendant.

March 2, 1896.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify the foregoing pages, numbered from 1 to 86, inclusive, to be true copies of originals in cause No. 12263, equity, wherein Horace S. Cummings is complainant and Henry M. Baker is defendant, as the same remain upon the files and records of said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 11th day of March, A. D. 1896.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 565. Henry M. Baker, appellant, *vs.* Horace S. Cummings. Court of Appeals, District of Columbia. Filed Mar. 28, 1896. Robert Willett, clerk.

WEDNESDAY, *May* 6, *A. D.* 1896.

HENRY M. BAKER, Appellant,
vs.
HORACE S. CUMMINGS. } No. 565.

The argument in the above-entitled cause was commenced by Mr. S. R. Bond, attorney for the appellant, and was continued by Mr. H. O. Claughton, attorney for the appellee.

THURSDAY, *May 7th, A. D.* 1896.

HENRY M. BAKER, Appellant,
vs.
HORACE S. CUMMINGS. } No. 565.

The argument in the above-entitled cause was continued by Mr. F. H. Mackey, attorney for the appellee, and was concluded by Mr. S. R. Bond, attorney for the appellant.

317 HENRY M. BAKER, Appellant, vs. HORACE S. CUMMINGS. } No. 565.

Opinion of Court.

Mr. Justice MORRIS delivered the opinion of the court:

This is a proceeding in equity for the settlement of partnership accounts.

Upon a former appeal in the case we affirmed a decree of the supreme court of the District of Columbia which declared void an alleged agreement between the parties and ordered a reference to the auditor of that court for the statement of an account between them. (See Baker *v.* Cummings, 4 App. D. C., 230.) Upon the reference thereafter had, the auditor found the sum of $27,916.57 to be due from the appellant to the appellee, with interest on $27,350.09 thereof from September 1, 1889, the date of the final dissolution of the partnership, to July 1, 1895, and on $566.48 thereof from October 30, 1890, when it was shown to have been actually received by the appellant, to July 1, 1895. The date of July 1, 1895, seems to have been adopted by the auditor as the date to which he would calculate the interest, for the reason that it was expected that, on or about that day, the court would act upon his report, which was filed on June 18, 1895. The total amount of the interest thus calculated was $9,731.13; and this added to the principal made a total sum of $37,647.70 due from the appellant to the appellee as of the date of July 1, 1895.

Exceptions were taken to the report by both parties; but at the hearing these were all overruled, and the report was ratified and confirmed. The court then proceeded to enter up a decree in accordance with the report. But it seems that it was about to keep open a certain matter of controversy between the parties, wherein the fees or profits did not appear to have been fully collected by the complainant, who was the person charged with the management of that portion of the partnership business; and thereupon, the complainant, being desirous of an absolutely final decree and termination of the litigation, consented in open court to a further allowance of $4,875.56 in favor of the appellant, which, in addition with the amount allowed by the auditor in the same connection, constituted the total amount of the principal sum or fee claimed therein by the appellant. This further allowance was accordingly deducted from the aggregate amount of the principal and interest, as found by the auditor; and a decree was rendered in favor of the complainant, the appellee here, for the sum of $32,772.14, being the balance of the account, with interest upon such balance from July 1, 1895, until paid, for which execution as at law was awarded. From this decree the defendant has appealed to this court.

There are eight assignments of error. Six of these, it is conceded, were made upon the former appeal, in which they were decided adversely to the appellant. By their renewal here it was not sought

to renew the discussion of them, but only, it seems, to preserve
318 them for another tribunal. Only the seventh and eighth assignments were argued at this hearing. By comparison of these assignments with the seven exceptions taken by the appellant to the auditor's report, it will be seen that several of these exceptions have been waived or abandoned.

By the exceptions here insisted upon and the assignments of error thereupon based, two questions are raised: 1st. Whether the appellant is entitled to compensation for his personal services in the prosecution of certain claims constituting part of the partnership business and comprising the most important element in the accounting between the parties; and, 2d, whether it was proper to allow interest in the decree from July 1, 1895, on the aggregate balance of principal and interest found by the auditor to be due on that day from the appellant to the appellee.

1. With reference to the first question, the auditor in his report has well stated the law and the facts as follows:

"A claim was presented by the defendant for compensation for personal services in obtaining, prosecuting, and collecting these inspector claims on the basis of the difference between one-half and one-third of the net fees, which claim was subsequently amended by the substitution of a claim for personal services in obtaining, prosecuting, and collecting inspector cases subsequent to September 6, 1886, the amount so claimed being forty-two thousand seven hundred dollars, and against the objection of the plaintiff's solicitors I received evidence touching the extent and character of the said services as well as of their value, which testimony is returned with this report. This claim is presented and urged upon the ground that the decree annulling the sale of September 6, 1886, does not restore the status of the partnership as to the inspector cases, but only entitles the plaintiff to an equitable portion of the fees realized in the said cases, and that in the ascertainment of that portion the extra services rendered by the defendant in procuring, prosecuting, and collecting these claims after the date of the said sale and assignment and rendered in the belief that the plaintiff had no further interest in the said claims should be compensated for, especially as that belief was apparently acquiesced in by the plaintiff during the entire period. Cases are cited in which extra compensation has been allowed by courts to a surviving or remaining partner for services rendered in continuing and conducting the partnership business after the death or withdrawal of his copartner, but each of these cases is that of an absolute dissolution of the partnership relation. In this case, in my judgment, the decree of the court annulling the assignment or sale has the effect of reinstating the partnership as it existed prior to that sale, as to the inspector cases, and to continue that partnership until the complete or general dissolution, in September, 1889. In this view of the case we must treat this claim of the defendant as that of one member of an active, existing partnership for an extra share of the profits realized from the joint business, on the ground of contributing to that business a greater amount of time and service than his copartner, a claim which

cannot be maintained under any authority of text-writers or
319 adjudicated cases, so far as my inquiry extends. I have therefore to exclude this claim from allowance in my account."

The auditor was undoubtedly right in his conclusion; and the court below very properly affirmed his finding. Any different conclusion would have allowed the appellant to benefit by his own wrong, inasmuch as the pretended sale and transfer to him of September 6, 1886, was his own wrongful act. Exceptional cases there are, of course, in which a partner might justly be allowed extraordinary compensation for his personal services; but no such exceptional case is here presented. The inspector cases, so called, seem to have constituted a portion of the partnership business to which the special attention of the appellant was to be given in any event; and he seems to have done no more in regard to them after the illegal transaction of September 6, 1886, than it was his duty to do if that transaction had never been attempted.

Comment on the extravagant character of a claim of $42,700 as a compensation for personal services in the collection of the sum of $97,820.14, is somewhat precluded by the admission of counsel in argument that they do not seriously contend for that amount, but only that the appellant should be allowed to go before the auditor for *some* compensation for his personal services. We think the auditor and the court below were entirely right in declining to recognize any claim whatever to compensation in the premises.

2. The question in regard to the allowance of interest has been more earnestly and with more plausibility argued than that of compensation for personal services. And this question is not entirely free from difficulty. But it seems to us that we are compelled to follow in this regard the rule laid down by the Supreme Court of the United States in the case of Stuart *v.* Gay, 127 U. S., 518, 531, where that court, by Mr. Justice Matthews said: "The question, however, still recurs whether the rule for computing interest on the debts as the basis of distribution adopted by the court in its decree of January 5, 1884, is correct as a matter of law. On this point, there is no reason for doubt. The decree of sale, as we have already stated, contained no finding of the amount of the indebtedness, nor of the persons to whom it was owing, and no order for its payment as a condition of redeeming the property from the necessity of sale. But the report of the master of April 21, 1876, contained a full and carefully prepared detail of all the items constituting the indebtedness, with a list of the creditors, a classification according to the order of priority in the matter of lien, and a calculation of interest to October 15, 1875, upon all debts, except those embraced in class No. 1, in respect to which special provision was subsequently made showing the total amount then due to each creditor. It is not stated anywhere in the record why the date of October 15, 1875, was selected by the master as a place of rest in the calculation of interest, but it must have been taken as the most convenient day for calculations in reference to closing the report, which evidently required considerable time for its preparation. If the calculation had been

made as of the date of the decree for sale, with a view to the insertion therein of the amounts due to the several creditors, on payment of which the sale might be averted, the interest would have been brought down most properly to that date and added to the principal to constitute the whole sum then payable. If not paid at that time, the aggregate of principal and interest thus combined would have constituted the new principal, which, according to the uniform practice of the court, would bear interest from that date. In that case there could have been no complaint made against compounding interest. We think a similar effect must be given to the decree of the court confirming the master's report made April 28, 1876. It substantially declared the amount due October 15, 1875, as consisting of the principal sums and interests to that date added for the purpose of the sale and distribution. * * * The amounts to be found due necessarily embraced the principal sum with the accrued interest up to a fixed date; and from that period the aggregate became the sum of the debt, the whole of which thenceforth properly carried interest."

The case of Stuart *v.* Gay went up on appeal from the circuit court of the United States for the State of West Virginia: but it does not appear that the statute law of that State had any bearing upon the decision, or that "the uniform practice of the court," referred to in the opinion, meant anything else than the practice of the courts of the United States sitting as courts of equity.

To the same effect is the case of National Bank of the Commonwealth *v.* Mechanics' National Bank, 94 U. S., 437; Connecticut *v.* Jackson, 1 Johns. Ch., 13.

This was also the rule and the practice of the court of chancery of Maryland (Hammond *v.* Hammond, 2 Bland's Chan. Rep., 306, 371–380); although it should be stated that in that State the rule of the common law, or rather of the statutory law in regard to judgments in common-law cases, was, and yet remains, the same as Mr. Chancellor Bland states the rule to be in equity.

The appellant's allegation of error, however, is based upon the fact that, in the District of Columbia, the statutory enactment in regard to interest on judgments at common law, to the analogy of which courts of equity would generally conform, is somewhat different from the existing law of Maryland, and probably from the laws of most of the States of the Union. This enactment, which is section 829 of the Revised Statutes of the United States for the District of Columbia, and which is taken from the act of Congress of June 24, 1812 (2 Stat., 756), provides that "upon all judgments rendered on the common-law side of the court in actions founded upon contracts, interest at the rate of six per centum per annum shall be awarded on the principal sum due until the judgment shall be satisfied, and the amount which is to bear interest and the time from which it is to be paid, shall be ascertained by the verdict of the jury sworn in the case." And this provision has been construed in practice to forbid the compounding of principal and accrued interest in judgments and the awarding of interest on the aggregate amount then ascertained to be due.

But besides the fact that this statute is by its express terms restricted in its application to certain suits at common law, it
321 seems never to have been understood prior to the year 1891 to have been intended in any manner to influence the practice of courts of equity, which, anterior to the year 1891, seems to have been entirely conformable to that stated in the case of Hammond *v.* Hammond, *supra*, as obtaining in Maryland, and which was inherited by us from that State. In fact, another act of Congress, that of April 22, 1870 (16 Stat., 91), incorporated into the Revised Statutes for the District of Columbia as section 713, would seem to be meaningless in some respects unless it were taken as confirming the previously existing practice in equity. That act provides that "the rate of interest on judgments or decrees, and upon the loan or forbearance of any money, goods or things in action, shall continue to be six dollars upon one hundred dollars for one year, &c., &c."

It is true that, in the case of Washington and Georgetown R. R. Co. *v.* Harmon's Administrator, 147 U. S., 511, the Supreme Court of the United States held that this act did not give interest on judgments where none existed before its enactment. But the act may nevertheless be properly construed to sanction and confirm the practice of equity to award interest upon its decrees, when those decrees already awarded an aggregate sum composed of principal and interest to the date of the decree or to some previous fixed date. And it seems to us that the act must be taken to negative any inference that might be drawn from section 829 and the maxim that equity should follow the law.

To the contrary is cited the case of Spalding *v.* Mason, decided by the supreme court of the District of Columbia in general term on July 10, 1891, and by the Supreme Court of the United States on appeal, at its present term, on March 2, 1896. In that case the special term of the supreme court of the District had done what it did in the case now before us—that is, it aggregated the principal and interest of an indebtedness to the date of the decree, or the date of the ratification of the auditor's report in the case; and then upon that aggregate sum awarded interest thereafter as upon a new principal. The general term modified that decree, so as to award to the complainant only the original principal, with interest thereon from the time at which such original principal should have been paid. The Supreme Court of the United States affirmed the decree of the general term with some modification that does not affect the question here involved.

But we do not understand the final decision in that case to have touched at all the question now before us. It is true that the decision of the general term is directly in point. But the modification made of the original decree by the general term was in favor of the appellant and defendant Spalding; and as Spalding was again the appellant to the Supreme Court of the United States, and as the other party (Mason) did not appeal, the question of the modification made by the general term was not open for discussion by that court, and is not touched upon in the opinion.

It seems to us that the general rule laid down in the case of Stuart *v.* Gay remains unaffected, and that until that rule is
322 modified for this District by the same high tribunal which announced it, we are bound by its terms.

3. In the eighth assignment of error is presumed to be involved another contention advanced on behalf of the appellant, to the effect that, on the sum of $4,875 56, agreed in open court at the time of the hearing of the case to be allowed by the appellee to the appellant, there should have been also an allowance of interest from the time of the dissolution of the partnership, September 1, 1889. This contention seems to us to be without merit.

Among the partnership assets was adjudged to be the amount received or to be received by the appellee Cummings for his commissions as the assignee of the insolvent firm of H. D. Cooke & Company. It was strenuously contended on behalf of Cummings that these commissions should not be regarded as part of the partnership assets; but that contention was subsequently waived by the action of Cummings, although it was made the subjection of the one exception taken by him to the auditor's report. It was conceded by him in the decree now appealed from by Baker that these commissions might properly go into the accounting.

It does not appear from the record that the appellee has actually received any commissions in the premises, but only that he yet holds some of the assets of the estate of H. D. Cooke & Co. as security for their payment. It appears, however, that he might have collected them, if he had chosen to devote to their satisfaction some of the funds realized which he had paid out to the creditors of the estate; and the auditor has accordingly charged him in the account with these commissions as if they had been actually received by him. The assets which passed through his hands amounted to $104,977.71. On this sum he was entitled by the deed of assignment to commissions at the rate of five per centum, which amounted to $5,248.88. With one-half of this, or the sum of $2,624.44, he was charged by the auditor in the accounting; and against his exception, as already stated, this was ratified and confirmed by the court.

But in his testimony in the case the appellee had made this statement: "The sum that I had expected to charge H. D. Cooke & Co. for services in the assigneeship was $15,000, which was to pay for services and the commissions on the collections and payments; that sum was fixed by me at that amount on the advice of Mr. John C. Bullitt, of Philadelphia, who thought it was a reasonable amount." And in consequence of this statement and of the expectation that the entire charge of $15,000 might ultimately be realized or received by the appellee, the appellant claimed to be entitled to a credit of $7,500 against the appellee instead of $2,624.44, as found by the auditor. The court below, it seems, was about to formulate the decree so as that it might be left open to the appellant, to apply to the court whenever and if ever any balance of the anticipated fee of $15,000 should be realized by the appellee. But the appellee, as we are told, rather than have the decree remain open, agreed to the allowance to the appellant of the further sum of $4,875.56,

required, with the allowance made by the auditor, to make up the whole sum of $7,500 claimed by the appellant. And
323 accordingly, this further allowance was made in the decree.

The appellant, however, is not satisfied with the allowance, without interest upon it from the date of the dissolution of the partnership. He had been allowed interest on the $2,624.44.

The appellant's claim in this regard we consider to be wholly without merit. It is conceded that the appellee has not collected the $5,248.88. It is not shown that he is entitled to it, or that he should have collected it. From this record there is no just ground whatever for awarding that amount to the appellant. It may be that he would ultimately become entitled to it, but only from the time that it would be or should be received by the appellee; and from that time only would it bear interest, if the appellee failed to account promptly for it. Payment of the amount at present gives him more than he could by any possibility be entitled to in the future upon the basis of his claim.

We do not think that there is any error in the decree appealed from; and we must accordingly affirm that decree, with costs. And it is so ordered.

TUESDAY, *May 19th, A. D.* 1896.

HENRY M. BAKER, Appellant,
vs.
HORACE S. CUMMINGS. } No. 565. April Term, 1896.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia and was argued by counsel. On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said supreme court in this cause be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE MORRIS.

May 19, 1896.

MONDAY, *May 25th, A. D.* 1896.

HENRY M. BAKER, Appellant,
vs.
HORACE S. CUMMINGS. } No. 565.

On motion of Mr. S. R. Bond, attorney for the appellant in the above-entitled cause, it is ordered by the court that said appellant be allowed an appeal to the Supreme Court of the United States on giving a supersedeas bond in the sum of fifty thousand dollars ($50,000).

Know all men by these presents that we, Henry M. Baker, as principal, and Samuel F. Merrill and Rufus K. Helphenstine, as sureties, are held and firmly bound unto Horace S. Cummings in the full and just sum of fifty thousand dollars ($50,000), to be paid to the said Horace S. Cummings, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be

made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

324 Sealed with our seals and dated this 27th day of May, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court between said Henry M. Baker, appellant, and Horace S. Cummings, appellee, a decree was rendered against the said Henry M. Baker, and the said Henry M. Baker having been allowed an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Horace S. Cummings, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said Henry M. Baker shall prosecute his said appeal to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

HENRY M. BAKER. [SEAL.]
SAMUEL F. MERRILL. [SEAL.]
RUFUS K. HELPHENSTINE. [SEAL.]

Sealed and delivered in the presence of—
WM. K. ELLIS.

Satisfactory.
FRANKLIN H. MACKEY,
Of Counsel for Appellee.

Approved by—
MARTIN F. MORRIS,
Associate Justice Court of Appeals, D. C.

(To operate as a supersedeas bond.)

(Endorsed:) No. 565. Henry M. Baker, appellant, *vs.* Horace S. Cummings. Supersedeas bond on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed May 29, 1896. Robert Willett, clerk.

UNITED STATES OF AMERICA, *ss:*

To Horace S. Cummings, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Henry M. Baker is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Martin F. Morris, associate justice
325 of the Court of Appeals of the District of Columbia, this 29th day of May, in the year of our Lord one thousand eight hundred and ninety-six.

MARTIN F. MORRIS,
Associate Justice of the Court of Appeals of the District of Columbia.

Service acknowledged May 29th, 1896.
FRANKLIN H. MACKEY,
Sol. for Appellee.

(Endorsed:) Court of Appeals, District of Columbia. Filed Jun- 1, 1896. Robert Willett, clerk.

Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 288, inclusive, contain a true copy of the transcript of the record and proceedings of said Court of Appeals in the case of Henry M. Baker, appellant, *vs.* Horace S. Cummings, being Nos. 339 and 565, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at th[illegible] of Washington, this 17th day of June, [illegible] D. 1896.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

In the Supreme Court of the United States.

HENRY M. BAKER, Appellant,
vs.
HORACE S. CUMMINGS.
} No. 189. October Term, 1897.

It is hereby stipulated and agreed that the record in this case shall be so printed as to give the testimony in the order in which the same was taken, and the clerk of the court is requested to have the printing done accordingly, viz:

As in the printed record filed down to and including the replication on page 18.

Next, complainant's testimony-in-chief, followed by defendant's testimony-in-chief, covering from near the top of page 53 (marginal page 92) to "surrebuttal testimony" near the bottom of page 165.

Next, complainant's testimony in rebuttal, after the replication on page 18, down to and including the certificate of J. Arthur Lynham, examiner in chancery, on page 53.

Next, defendant's "surrebuttal testimony" near the bottom of page 165 to the end of page 167.

After page 167 print as in the present record.

It is further stipulated and agreed that "Exhibit H. M. B.
326 No. 3" (page 176) may be entitled "List of cases settled in 1886, showing amounts allowed, fees, &c."

Exhibit at top of page 181 may be entitled "Exhibit H. M. B. No. 4, showing cases suspended."

Exhibit at top of page 183 may be entitled "Exhibit H. M. B. No. 5, showing cases in which the contract fees were less than 25 per cent."

Exhibit at top of page 184 may be entitled "Exhibit H. M. B. No. 6, List of cases outstanding."

Exhibit on page 186 (marginal page 333) may be entitled "Exhibit H. M. B. No. 7, List of cases pending."

Exhibit at middle of page 197 (marginal page 356) may be entitled "Exhibit H. M. B. Nos. 10 and 11."

Exhibit on page 200 (marginal page 362) may be entitled "Exhibit H. M. B. No. 12;" and the clerk is requested to have said exhibits entitled and headed accordingly.

Sept. 25, 1897.

S. R. BOND, *Sol'r for Appellant.*
FRANKLIN H. MACKEY,
Sol'r for Appellee.

(Endorsed:) Case No. 16,320. Supreme Court U. S., October term, 1897. Term No., 189. Henry M. Baker, app't, *vs.* Horace S. Cummings. Stipulation as to printing record. Office Supreme Court U. S. Filed Oct. 4, 1897. James H. McKenney, clerk.

Endorsed on cover: Case No. 16,320. District of Columbia Court of Appeals. Term No., 189. Henry M. Baker, appellant, *vs.* Horace S. Cummings. Filed June 18th, 1896.

327 Supreme Court of the District of Columbia.

MONDAY, *March* 27, 1899.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

HENRY M. BAKER, Plaintiff,
vs.
HORACE S. CUMMINGS, Defendant. } At Law. No. 30197.

Now comes here as well the plaintiff, by his attorney, C. A. Brandenburg, as the defendant, by his attorney, Franklin H. Mackey, and file their stipulation waiving a trial by jury and submitting the case upon an agreed statement of facts, and the same having been argued by counsel, and after consideration thereof, the court finds said facts in favor of the plaintiff for the amount claimed in his declaration. Therefore it is considered that the plaintiff recover against the defendant two thousand seven hundred and twelve dollars and eighty-one cents ($2,712.81), with interest thereon from the 31st day of July, 1889, being the money payable by him to the plaintiff by reason of the premises, together with his costs of suit, to be taxed by the clerk, and have execution thereof.

328 *Order for Appeal and Citation.*

Filed Apr. 12, 1899.

In the Supreme Court of the District of Columbia, the 12th Day of April, 1899.

H. M. BAKER
vs.
H. S. CUMMINGS. } At Law. No. 30197.

The clerk of said court will enter an appeal from the judgment entered herein March 27th, 1899, and issue citation.

FRANKLIN H. MACKEY,
Attorney for Def't.

Memorandum.

April 12, 1899.—Appeal bond filed.

329 In the Supreme Court of the District of Columbia.

HENRY M. BAKER
vs.
HORACE S. CUMMINGS. } At Law. No. 30197.

The President of the United States to Henry M. Baker, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal filed in the supreme court of the District of Columbia on the 12 day of April, 1899, wherein Horace S. Cummings is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 12 day of April, in the year of our Lord one thousand eight hundred and ninety-nine.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 13th day of April, 1899.

C. A. BRANDENBURG,
Attorney for Appellee.

330 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify the above and foregoing pages, numbered from 1 to 43, inclusive, to be a true and correct transcript of the record and proceedings, as prescribed by rule 5 of the Court of Appeals of the District of Columbia, in cause No. 30197, at law, wherein Henry M. Baker is plaintiff and Horace S. Cummings is defendant, as the same remains upon the files and of record in the said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 29th day of April, A. D. 1899.

Seal Supreme Court of the District of Columbia.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 898. Horace S. Cummings, appellant, *vs.* Henry M. Baker. Court of Appeals, District of Columbia. Filed May 3, 1899. Robert Willett, clerk.

ADDITION TO RECORD PER STIPULATION OF COUNSEL.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1899.

No. 898.

HORACE S. CUMMINGS, APPELLANT,

vs.

HENRY M. BAKER.

FILED SEPTEMBER 19, 1899.

In the Court of Appeals of the District of Columbia.

HORACE S. CUMMINGS, Appellant,
vs.
HENRY M. BAKER, Appellee. } No. 898.

It is hereby stipulated by and between the parties to this cause, by their respective attorneys, that the annexed three papers are respectively true copies of the mandates of the Court of Appeals and the Supreme Court of the United States of the dates set forth in said copies, and also of the final decree of the supreme court of the District of Columbia upon said mandates; and it is further stipulated that the same may be printed and form part of the record in this cause, and that the printed record now on file is the same record as appears in the Court of Appeals of the District of Columbia and the Supreme Court of the United States.

CLARENCE A. BRANDENBURG,
Att'y for Appellee.

FRANKLIN H. MACKEY,
Att'y for Appellant.

UNITED STATES OF AMERICA, *ss*:

[Seal Supreme Court U. S.]

The President of the United States of America to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Whereas lately, in the Court of Appeals of the District of Columbia, before you or some of you, in a cause between Henry M. Baker, appellant, and Horace S. Cummings, appellee, No. 565, wherein the decree of the said Court of Appeals, entered in said cause on the 19th day of May, A. D. 1896, is in the following words, viz:

"This cause came on to be heard on the transcript of the record from the supreme court of the District of Columbia and was argued by counsel. On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said supreme court in this cause be, and the same is hereby, affirmed with costs."

As by the inspection of the transcript of the record of the said Court of Appeals, which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress in such case made and provided, fully and at large appears;

And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and ninety-seven, the said cause came on to be heard before the said Supreme Court on the said transcript of record and was argued by counsel:

On consideration whereof it is now ordered, adjudged, and decreed by this court that the decree of the said Court of Appeals in this cause be, and the same is hereby, reversed with costs, and that the said appellant, Henry M. Baker, recover against the said appellee five hundred and ninety-four dollars and seventy-five cents for his costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said Court of Appeals, with directions to set aside the decree of the supreme court of the District of Columbia and to remand the cause to that court with instructions to dismiss the bill.

February 21, 1898.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this court, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 12th day of April, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Costs of Appellant.

Clerk	$234.50
Printing record	340.25
Attorney	20.00
	$594.75

A true copy.

[Seal Court of Appeals, District of Columbia.]

Test: ROBERT WILLETT, *Clerk.*

[Endorsed:] Supreme Court of the United States. No. 189, October term, 1897. Henry M. Baker *vs.* Horace S. Cummings. Mandate. Court of Appeals, District of Columbia. Filed Apr. 13, 1898. Robert Willett, clerk.

Filed April 16, 1898.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the justices of the supreme court of the District of Columbia, Greeting:

Whereas lately, in the supreme court of the District of Columbia, before you or some of you, in a cause between Horace S. Cummings, complainant, and Henry M. Baker, defendant, equity, No. 12263, wherein the decree of the said supreme court, entered in said cause on the 17th day of February, A. D. 1896, is in the following words, viz:

"This cause coming on to be heard upon the exceptions of the plaintiff and defendant respectively to the report of the auditor, filed herein on the 18th day of June, 1895, and counsel for the respective parties having been heard, and the said exceptions having been duly considered by the court, it is this 17th day of February, A. D. 1896, adjudged, ordered, and decreed that the said exceptions of the plaintiff and defendant be, and the same are hereby, overruled, and the said report of the auditor be, and the same is hereby, in all things confirmed, and the plaintiff in open court now consenting to the defendant being allowed, in addition to the allowance made by the auditor to the defendant in the matter of the Henry D. Cook assignment, the further sum of four thousand eight hundred and seventy-five dollars and fifty-six cents ($4,875.56), it is therefore by the court further adjudged, ordered, and decreed that the plaintiff recover of the defendant the sum of thirty-two thousand seven hundred and seventy-two dollars and fourteen cents ($32,772.14), with interest thereon from the first day of July, 1895, until paid; also his costs, and that he have execution therefor as at law.

A. B. HAGNER,
Asso. Justice."

As by the inspection of the transcript of the record of the said supreme court, which was brought into the Court of Appeals of the District of Columbia by virtue of an appeal, agreeably to the act of Congress in such case made and provided, fully and at large appears;

And whereas, in the term of April, in the year of our Lord one thousand eight hundred and ninety-six, of the said Court of Appeals, the following decree was entered, viz:

"This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said supreme court in this cause be, and the same is hereby, affirmed with costs."

And whereas said cause was removed to the Supreme Court of the United States by virtue of an appeal taken by Henry M. Baker, agreeably to the act of Congress in such case made and provided, and whereas, at the October term, 1897, of the said Supreme Court of the United States, the following decree was entered, viz:

"It is now here ordered, adjudged, and decreed by this court that the decree of the said Court of Appeals in this cause be, and the same is hereby, reversed with costs, and that the said appellant, Henry M. Baker, recover against the said appellee five hundred and ninety-four dollars and seventy-five cents for his costs herein expended, and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said Court of Appeals, with directions to set aside the decree of the supreme court of the District of Columbia, and to remand the cause to that court with instructions to dismiss the bill.

February 21, 1898."

As by the inspection of the mandate of the said Supreme Court fully and at large appears;

And whereas, in the present term of April, in the year of our Lord one thousand eight hundred and ninety-eight, the said cause came on to be heard before the said Court of Appeals, and in pursuance of the mandate of the Supreme Court of the United States filed in this cause it is now here ordered, adjudged, and decreed that the decree of this court rendered herein on the 19th day of May, A. D. 1896, be, and the same is hereby, vacated, and that the decree of the supreme court of the District of Columbia appealed from be, and the same is hereby, set aside with costs, and that the said defendant, Henry M. Baker, recover against the said complainant, Horace S. Cummings, eleven hundred and two dollars and thirty-three cents for his costs herein expended, and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the supreme court of the District of Columbia, with instructions to dismiss the bill.

April 13, 1898.

You, therefore, are hereby commanded that such execution and

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further proceedings be had in said cause, in conformity with the decree of this court, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Richard H. Alvey, chief justice of said Court of Appeals, the 16th day of April, in the year of our Lord one thousand eight hundred and ninety-eight.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Costs of H. M. Baker in Supreme Court U. S.

Clerk	$234.50
Attorney	20.00
Printing record	340.25
Costs Court of Appeals, D. C.	507.58
	$1,102.33

Final Decree upon Mandate of Court of Appeals.

Filed April 18, 1898.

In the Supreme Court of the District of Columbia.

HORACE S. CUMMINGS, Complainant,
vs.
HENRY M. BAKER, Defendant.
} Equity. No. 12263.

This cause, coming on to be heard upon the mandate of the Court of Appeals of the District of Columbia, dated April 16, 1898, filed herein and now presented to the court, and upon motion of S. R. Bond, defendant's solicitor, for a decree in conformity with said mandate—

It is by the court, this 18th day of April, 1898, adjudged, ordered, and decreed that the complainant's bill of complaint be, and the same is hereby, dismissed, and that the defendant, Henry M. Baker, recover of the complainant, Horace S. Cummings, the sum of eleven hundred and two dollars and thirty-three cents, being the costs specified in said mandate; and, further, the costs in this cause in this court, and that he have execution therefor as at law.

A. B. HAGNER,
Asso. Justice.

Endorsed on cover: No. 898. Horace S. Cummings, appellant, *vs.* Henry M. Baker. Addition to record per stipulation of counsel. Court of Appeals, District of Columbia. Filed Sep. 19, 1899. Robert Willett, clerk.

318 THURSDAY, *October* 19*th*, *A. D.* 1899.

HORACE S. CUMMINGS, Appellant,
vs.
HENRY M. BAKER. } No. 898.

The argument in the above-entitled cause was commenced by Mr. F. H. Mackey, attorney for the appellant, and was continued by Mr. C. A. Brandenburg, attorney for the appellee, and was concluded by Mr. Holmes Conrad, attorney for the appellant.

319 HORACE S. CUMMINGS, Appellant,
vs.
HENRY M. BAKER. } No. 898.

(Mr. Justice SHEPARD delivered the opinion of the court:)

The parties to this appeal had been partners, as claim agents and attorneys, in the city of Washington for some years before September 1, 1889, at which time their partnership was dissolved.

Litigation between them concerning receipts of the former partnership business began December 19, 1889, with the declaration in assumpsit filed in this case in the supreme court of the District of Columbia by Henry M. Baker against Horace S. Cummings, wherein he claimed the sum of $2,712.81, with interest from July 31, 1889.

An accompanying bill of particulars sets out many items of receipts and expenses, with credits of like character, and shows the balance aforesaid.

On February 1, 1890, and before time for pleading to the declaration had expired, Cummings filed a bill in equity in said court against Baker, the direct object of which was to set aside for fraud a transfer by Cummings to Baker of all his interest in certain fees of the business, made about three years before the dissolution of the partnership.

The bill alleges the existence of a partnership between the parties from about July 1, 1874, until its dissolution by mutual consent, September 1, 1889.

320 It is then alleged that a large part of the business of the partnership had consisted of what are called "inspector's cases;" that each partner had the management of special classes of the business, and these "inspector's cases" fell under the control of Baker, who had complete knowledge of the number, amount, and condition of the same, whilst Cummings was not informed thereof; that the interest of the partners in said cases was one-fourth of the collections, which was to be divided between them; that about September 6, 1886, Baker offered Cummings $15,000 for his interest in the fees of said "inspector's cases;" that Baker, after having furnished Cummings a bundle of papers concerning said claims, from which he was unable to learn their amount and condition, represented to him "that the amount of fees earned and payment of which was already provided for by act of Congress was but the sum of $20,000, and the amount of all other claims of said inspec-

tor's cases not then appropriated for would be about $80,000, in which last-mentioned cases the expected fees to accrue to the firm would be about $20,000."

That relying solely upon the representations of Baker, Cummings agreed to take $10,000 for his interest in the $20,000 of fees in claims already appropriated for and $5,000 for those in expectancy—in all, $15,000.

That thereupon Baker paid Cummings $15,000 and received from him a transfer, which, having been made an exhibit to Baker's answer, reads thus:

321 "WASHINGTON, D. C., *Sept. 6th*, 1886.

Received of Henry M. Baker fifteen thousand ($15,000) dollars in full for all interest in and right to fees in the so-called inspector cases. This includes all cases in which fees have not been divided and settled, except one draft to the order of John C. Long, and one to the order of James Mitchell, both dated in 1875, whether paid or unpaid, filed, or outstanding.

(Signed) H. S. CUMMINGS.

That at the time of his inquiry of the said defendant as aforesaid, and when the assignment was made as aforesaid, instead of their being, as represented by defendant, but twenty thousand dollars ($20,000.00) of fees in the cases in which there had been appropriations made by Congress as aforesaid, as complainant afterward discovered, more than thirty-two thousand dollars ($32,000.00) of such fees — earned, and of which the greater portion had already been collected by the defendant, and in which the share of this complainant, as an equal partner with the defendant was one-half, or more than sixteen thousand dollars ($16,000.00), and the complainant therefore avers that the representation of the said defendant in regard thereto was false, untrue and misleading, and tended to the manifest injury, wrong and prejudice of the complainant in the premises. And the complainant further shows that instead of there being only eighty thousand dollars of claims in cases where no congressional appropriation had been made, there were more than two hundred and seventy-five thousand dollars of such claims, and although complainant does not aver that the said defendant knew the exact and full extent of the claims unappropriated for at the time he made the representations in regard thereto, yet he believes, and therefore avers the fact to be, that the defendant well knew that he was largely understating the amount thereof when he stated the same to be eighty thousand dollars, and well knew that the complainant relied upon the truth of said statement as a basis of the agreement which resulted in said assignment."

322 That Cummings was, by the wrongful acts of Baker, as aforesaid, induced to execute the assignment aforesaid which Baker now holds against equity and good conscience, and the same ought to be regarded as null and void, and that Cummings is of right entitled to an equal division not only of said $32,000, but also

of such fees as the said defendant has received out of the claims subsequently collected upon an accounting to be had thereof.

The bill concludes with the following allegation and prayers:

"10. And the complainant further shows that on the 19th day of December, 1889, the said defendant commenced an action of assumpsit upon the common counts against the complainant on the law side of this court, demanding the sum of $2,712.81 and interest from the 31st day of July, 1889, and appended to his declaration a bill of particulars of his claim, which said declaration and bill of particulars the complainant makes a part hereof, and prays leave to read on the hearing of this cause as often as occasion may require. And complainant avers that all of the items in the said bill of particulars originate in and grow out of the partnership dealings of the parties, and not otherwise, and that the said items do not constitute a full adjustment of the rights of this complainant and the said defendant, and that only by a full, proper, and complete accounting and discovery under the order and direction of a court of equity could a proper adjustment be had of the rights and equities of the complainant and defendant growing out of their partnership dealings. That the said suit at law is not yet at issue, but that the time for pleading thereto has nearly approached, and that the complainant cannot under the rules of pleading at law incorporate in his plea the equitable defences herein set forth, and which in a court of equity would prevail against the defendant's demand, and especially is the equitable right of the complainant to have discovery in the premises and to have the said assignment cancelled and held for nought a matter not cognizable by a court of law, and if the defendant were, therefore, permitted to prosecute his said suit at law against complainant this complainant would be deprived of his defences to said suit now pending as aforesaid, and that the complainant is therefore entitled to have the defendant enjoined from prosecuting his said suit at law and to have this court order and direct a full and complete accounting between complainant and defendant in respect of their partnership dealings as aforesaid."

323 Wherefore complainant prays as follows:

* * * * * * *

"2. That the said assignment be declared null and void and be held for naught, and that the defendant be directed to surrender the same for cancellation.

3. That the defendant may be enjoined from the further prosecution of said suit at law, begun in the supreme court of the District of Columbia on the 19th day of December, 1889, and numbered on the docket of said court as law No. 30197, pending this cause, and that upon final hearing the injunction may be made perpetual.

4. That a full and complete account may be had under the order and direction of this court between the complainant and defendant in respect of the said partnership dealings, and the defendant be decreed to pay to complainant the amount which may be found to be due him, and for a full and complete discovery as to all matters herein set forth.

5. That the complainant may have such other and further relief as to the court may seem just."

Defendant Baker filed a lengthy sworn answer to this bill, wherein he stated the character of the partnership business and alleged full knowledge by Cummings of all matters connected with the "inspector's cases," and a fair purchase and sale of his interest therein. He explicitly denied the allegations of misrepresentations, fraud, and unfairness in the matter of the said assignment.

The answer concludes with the special defence of laches, as follows:

"This defendant, further answering, says this is an attempt on behalf of the complainant, after the lapse of more than three years, with the full knowledge of all the facts, to attack said sale as void. The claim here made by complainant is old and stale, and such as is not favored in equity; and especially ought such demands as this be frowned down by equity after the lapse of this period of time, and during the whole period and over of three years the complainant has not said nor made any effort against the *bona fides* of said transaction; and the complainant here pleads the statute of limitations in his behalf; that said claim did not accrue, nor was any demand made to show error or otherwise by complainant to defendant within the period of three years."

324 An order was issued restraining the further prosecution of this action at law, which was dissolved about February 1, 1892.

On February 10, 1892, Cummings filed pleas of non-assumpsit, limitation, &c., and two others in set-off, claiming a balance due by Baker of $35,873.35.

Accompanying these pleas was a bill of particulars containing an itemized statement of moneys received by Baker and unaccounted for, some of which items bear date as received within three years next preceding the filing of the counter-claim.

Issue was joined on the pleas, and by consent further proceedings were stayed until the case in equity could be determined.

The bill aforesaid was sustained in the equity court and an account was ordered to be made by the auditor. This having been made, a final decree was rendered on behalf of Cummings against Baker for the sum of $32,772.14, on February 17, 1896.

This decree was affirmed on appeal to the Court of Appeals. (See 8 App. D. C., 515, and 4 *idem*, 230.) On appeal to the Supreme Court of the United States, the decree of the Court of Appeals was reversed, and the cause was remanded to that court, "with directions to set aside the decree of the supreme court of the District of Columbia, and to remand the cause to that court with instructions to dismiss the bill." (See Baker *v.* Cummings, 169 U. S., 189.)

The mandate, in accordance with the custom, concludes with commanding that further proceedings be had "in conformity
325 with the opinion and decree of this court," &c. The decree and mandate of the Court of Appeals follow the same form.

This decree was pleaded by Baker as an adjudication of all matters embraced in Cummings' plea of set-off.

The case went to final trial and judgment was rendered in favor of Baker upon the following stipulation:

"It is hereby stipulated and agreed by and between the parties to this cause, by their respective attorneys, that this cause may be tried by the court without a jury, the parties hereby expressly waiving the same, upon the following agreed statement of facts, subject to the limitations herein contained:

That on the 31st day of July, A. D. 1889, and for a long time prior thereto, the plaintiff and the defendant were copartners engaged as attorneys in the prosecution of claims against the United States, the net fees derived therefrom being under the contract of partnership equally to be divided between them, the said partners; that on the 19th day of December, A. D. 1889, the plaintiff instituted this action to recover the sum of $2,712.81, with interest from the 31st day of July, A. D. 1889; that the said sum is the identical sum referred to on pages 227 and 248 of the record on appeal to the Supreme Court of the United States in the equity cause hereinafter referred to; that after the institution of this suit the defendant herein instituted a certain equity proceeding against the plaintiff herein in the supreme court of the District of Columbia, the same being known and numbered on the dockets of said court as equity cause No. 12263; the records, decrees, and opinions of the respective courts therein, both in this and the appellate courts, are hereby referred to and made part hereof; that the several items of account set forth in the pleas of set-off herein are respectively the identical items set up, referred to, and claimed in said equity cause.

If the court on inspection of said record and proceedings in said equity cause and of the record and proceedings of this cause shall be of opinion that the defendant herein may not set up in bar of the plaintiff's action any of said items of set-off and counter-claim as pleaded in this action, but is concluded by the proceedings and decree in said equity cause, then this court may enter judgment for the plaintiff in this action for the sum of $2,712.81, with interest thereon from the 31st day of July, A. D. 1889, as claimed in his declaration herein, but if the court shall be of opinion that any of said items of set-off and counter-claim may be set up in bar of the plain-
326 tiff's action herein, then this cause shall be remanded to the docket for trial by jury. Both parties hereto reserve the right of appeal or by writ of error from the judgment of this court or of any court of review passing hereon and also any other remedy which they may by law be entitled to.

HENRY M. BAKER.
HORACE S. CUMMINGS.

CLARENCE A. BRANDENBURG,
Att'y for Plaintiff.
FRANKLIN H. MACKEY,
Att'y for Defendant."

From that judgment Cummings has appealed.

1. The appellant's plea of set-off, if sustained, would, under the statutes regulating the practice in this District, entitle him to judgment for any balance found due after allowing the just demands of the plaintiff. R. S. D. C., sections 810, 811, 812.

This plea, with the replication thereto and rejoinder, present the direct issue of fraud in the procurement of the assignment made by Cummings to Baker, September 6, 1886, of his interest in the fees in the "inspector's cases." And the sole question involved in this appeal is the sufficiency of the appellee's defence of former adjudication of that issue, founded on the decree in the equity branch of the case.

The doctrine of *res judicata*, with the general limitations of its application, has been well settled by decisions of the Supreme Court of the United States, and there is no occasion to inquire beyond them. In the latest of these it is expounded by Mr. Justice Harlan, who delivered the opinion of the court, in the following words:

327 "The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies; and even of the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very objects for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them." S. P. R. R. *v.* U. S., 169 U. S., 1, 48.

2. The application of this general principle to the peculiar features of the case shown by this record presents a question of grave difficulty, involving, as it does, also the delicate task of defining the scope of a general decree entered in pursuance of a mandate of the Supreme Court of the United States.

328 The litigation between Baker and Cummings began with this action at law, in which, necessarily, the relief of both parties was confined to matters within the jurisdiction and remedies of a court of common law.

Cummings filed his bill in equity to stay the proceedings at law before the expiration of the time for pleading thereto had expired.

Therein, as shown in the statement of the case, he alleged the procurement of the said assignment through fraudulent misrepresentations and concealment, and prayed its cancellation. This, being a relief that could not be had at law, presented the necessary founda-

tion of the jurisdiction of the court of equity. In addition, he prayed for an accounting in respect of the claims, included now in the plea of set-off, and for a decree awarding him the balance found to be due thereon. This last relief could only be given by a court of equity as incidental to the matter upon which its jurisdiction was invoked and depended, upon the principle that equity jurisdiction having once attached, might be retained for the purpose of complete relief through the final adjudication of all rights involved.

The order staying the proceeding at law was shortly after dissolved, and the plea of set-off was then filed. Subsequent prosecution of the lawsuit was then suspended by consent. This plea would, of course, stop the statute of limitations as to any items
329 properly included in it from the date of its entry. Strange to say, the pendency of this issue at law was not brought to the attention of the courts which, in succession, passed on the case in equity. Had it been it is probable that the pending question would have been avoided either by a decree of qualified dismissal, on the one hand, or by an express adjudication on the other.

3. Notwithstanding the dismissal was ordered and entered without words of qualification, the appellant contends that the opinion of the Supreme Court may be resorted to for the ascertainment of the grounds and the limitation of the scope of that decree.

In this we concur. The opinion is a part of the record returned to this court and transmitted in turn to the court below. The mandate in the usual terms directs that further proceedings be in accordance with the transmitted opinion.

It is the one certain source of information in respect of the issues considered and determined.

In a case wherein the effect of a general decree of dismissal of a bill in a State court was under consideration the Supreme Court of the United States, without question, looked to the opinion of the supreme court of the State wherein the decree had been affirmed to ascertain what had been actually adjudicated. Phelps *v.* Harris, 101 U. S., 370, 374, 375.

In another case the unauthorized findings of fact filed by the trial court of a State were resorted to for the same pur-
330 pose. Last Chance Mining Co. *v.* Tyler Mining Co., 157 U. S., 683, 690.

In that case Mr. Justice Brewer said: "If it be true that the statutes of Idaho do not authorize findings of fact, it is none the less true that such findings are a declaration by the court of the matter it determines. Even if not conclusive against all testimony, they are certainly very persuasive evidence of what the court did in fact decide." He also quotes with approval an opinion of the court of appeals of Virginia in a case where that court held it proper to examine an opinion filed by the trial judge to ascertain the grounds of his judgment.

4. Before proceeding to an examination of the opinion of the Supreme Court for the ascertainment of the questions actually adjudicated by the decree it is in order to consider a contention on behalf of the appellee. That contention is that the estoppel of

former adjudication not only applies to what was actually decided, but also to everything that might have been decided in the equity suit, and is founded on an expression so often found in opinions discussing this vexed question. This expression, might have been decided, cannot, consistently with reason, be made to include every matter of fact and law that might have been determined in a case under some contingency that did not arise.

It would better mean, in our opinion, that which ought to have been decided—that is to say, what must have been decided
331 as expressly at issue, and that also which must either have been assumed, admitted expressly or by implication, or proved, in order to warrant the judgment or decree rendered.

This idea is clearly set forth by Mr. Justice Field in Cromwell *v.* County of Sac, 94 U. S., 351, 352.

Referring therein to the conclusiveness of a former judgment, he says:

"It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defences actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defences were not presented in the action and established by competent evidence, the subsequent allegation of their existence is of no legal consequence." See also Dowell *v.* Applegate, 152 U. S., 327, 343; W., A. & G. S. P. Co., *v.* Sickles, 24 How., 333, 341, 344, '5; Burlen *v.* Shannon, 99 Mass., 200, 202; Snyder *v.* McComb, 39 Fed. Rep., 292, 300.

5. It now remains to ascertain the questions actually determined by the Supreme Court in the equity case of Baker *v.* Cummings (169 U. S., 189).

332 Was that decision an adjudication of the merits of the cause?

A decree in equity, in accordance with the general principle before stated, is conclusive of the rights and questions involved in the case, "unless made because of some defect in the pleadings, or for want of jurisdiction, or because the complainant has an adequate remedy at law, or upon some other ground which does not go to the merits" (Durant *v.* Essex Co., 7 Wall., 107, 109; Hughes *v.* U. S., 4 Wall, 232, 237; Phelps *v.* Harris, 101 U. S., 370, 376; Cramer *v.* Moore, 36 Ohio St., 347, 349).

Now, as we have seen, the gravamen of the bill of Cummings was the cancellation of the assignment held by Baker. This alone conferred the jurisdiction in equity, and its finding in his favor was the necessary foundation of an inquiry into the state of the accounts between the parties looking to a decree for the balance that might be ascertained thereon.

The answer of Baker, it is true, contained a specific denial of each

and every allegation of fraud, but at the same time raised the question of Cummings' laches in seeking a remedy in equity.

Granting that all the other elements of jurisdiction may appear, yet courts of equity will notwithstanding refuse relief to which a complainant might otherwise be entitled where he has been guilty of inexcusable laches in seeking relief. "This form of quasi estoppel does not cut off the party's title nor his remedy at law.
It simply bars his right to equitable relief and leaves him
333 to his legal actions alone" (2 Pom. Eq., sec. 817).

He is simply refused consideration—turned out of equity—and remitted to his chances at law.

And this objection to the consideration of the merits of the complainant's case may be raised by the court, of its own motion, when it has not been suggested by his adversary (Mayse *v.* Gaddis, 2 App. D. C., 20, 27, and cases cited).

Refusal, then, to entertain a bill because of the laches of the complainant is not an adjudication upon the merits of the suit, and dismissal, for that reason, ought not to bar an action at law involving the same cause of action any more than where it is for want of jurisdiction on other grounds or for defect in the pleadings.

Turning now to the opinion by which the decree is to be interpreted, we think it shows with reasonable certainty that the decision was made to turn exclusively upon the complainant's laches. This can be made to appear in no better way than by quoting freely from the opinion.

After a very careful and complete statement of the case and of the issues to which the evidence was directed, the learned justice who delivered the opinion said:

"We will defer an examination of the testimony as to the existence of the fraud and misrepresentation complained of until we have passed on the charge that if there was fraud and misrepresentation
Cummings had full knowledge thereof immediately after the
334 sale. We adopt this order of consideration because, if it be found that such was the case, the question whether the fraud originally existed will become immaterial, in view of the defences of limitation and laches. Moreover, in reviewing the question of knowledge, we will do so in the order stated—that is, first, discovery of the alleged fraud and misrepresentation as to the amount of fees collected and in process of collection from claims appropriated for at the time of the sale; and, second, discovery of the misrepresentation as to the amount of pending claims from which further fees were expected. Here also it is to be premised that if the first proposition be found to be well taken, an examination of the second will be wholly unnecessary. This, obviously, is the case, for, as the statute of limitations began to run from the time when suit might have been brought to annul the sale, it results that the discovery of the falsity of any material and fraudulent representations by which the sale had been induced gave rise to the right to commence an action to rescind, and therefore fixed the period when the statute of limitations commenced its course."

The court then entered upon the inquiry whether the schedules

of earned fees given by Baker to Cummings immediately after the assignment were sufficient to convey to Cummings full information in regard to the amounts thereof.

After an analysis of the evidence on this point the conclusion reached was thus announced: "That the evidence not only
335 clearly, but beyond all question or dispute, overwhelmingly shows that if the false representations as to the earned fees were made as alleged, there was entire knowledge thereof by Cummings; and, for reasons heretofore stated, this conclusion renders unnecessary any inquiry into the question of when Cummings discovered the falsity of the alleged representations as to the amount of pending claims." The question to be decided was then stated:

"The question which arises is, can Cummings invoke the aid of a court of equity to afford him the relief which he seeks? A negative answer is compelled by a consideration of the most elementary principles."

Towards the conclusion of the opinion it is again said: "But the principle by which the bar of the statute of limitations is enforced by a court of equity and upon which the doctrine of laches rests is, that equitable powers will not be exercised to discover whether one has been wronged when, with full knowledge of the alleged wrong, he has allowed the bar of the statute of limitations to arise and has slept upon his rights until such a situation has arisen as to render it inequitable to afford him relief."

Then, as if to remove all doubt as to the real grounds of the decision, and at the same time to prevent any inference that actual fraud had been found to exist, the opinion concludes with the following words:

336 "Because we rest our conclusions upon the application of the bar of the statute and the laches of Cummings, we must not be considered as intimating that we conclude that there was either clear and convincing proof or even a preponderance of proof that the sale was as claimed by Cummings."

It is further contended on behalf of the appellee that the opinion shows an express adjudication that the entire demand of Cummings had been barred by the statute of limitations because of the lapse of more than three years between the discovery of the alleged fraud and the filing of the bill. This expression can only refer to the case before the court, which was the right to obtain cancellation of a contract on the ground of fraud after the lapse of more than three years from time of discovery.

That, as we have seen, was the essential purpose of the bill; the account and its items sought to be established after that cancellation were not passed upon. In the present action it is certainly true that all items of money received by Baker more than three years before the entry of the plea of set-off are barred by the statute of limitations; but as to items within that period it cannot operate. The action of Cummings, treating his plea of set-off as substantially a cross-action, is founded on the items of money had and received. The assignment of the interest in those fees is the defence of Baker;

and that defence, so far as fraud in its procurement affects the
337 right of recovery, is open to attack. Cummings has simply failed to cancel it and remove it as a ground of defence through his unsuccessful appeal to equity. He has been remitted, thereby, to his less effective remedy at law, where the statute of limitations can apply only to his cause of action as set out in his plea, and not to the evidence necessary to support it, or to meet and overcome the defence of his adversary.

The conclusion that the decree in equity is not a conclusive adjudication of the merits of the issue joined in this action at law is fully sustained by a decision of the Supreme Court, heretofore cited. Phelps *v.* Harris, 101 U. S., 370, 376, 382.

The case at bar seems stronger than that. It was an action of ejectment. The plaintiff had first instituted a suit in the chancery court of Mississippi to remove a cloud upon his title to the land in controversy, raised by a partition made under the supposed power contained in the will of the testator under whom he claimed. This bill was dismissed on the ground recited, "the court being of the opinion that the complainants are not entitled to the relief prayed for in their bill, or to any relief in the premises from this court." On appeal to the supreme court of the State the decree was affirmed.

In the action of ejectment, brought in the circuit court of the United States, that decree was pleaded as a conclusive adjudication of the title of the plaintiff. The denial of this effect in the circuit court was affirmed, on the ground that the decree amounted
338 in reality to nothing more than a refusal by the equity court to take jurisdiction, because the plaintiff's remedy, if any, was at law.

The opinion of the supreme court of Mississippi was examined to show that this was the ground of decision; but that opinion went much further and expressly declared the validity of the partition that had been assailed and the title of the defendant thereunder.

Referring to that opinion, Mr. Justice Bradley said:

"It is true that the court, in the former part of its opinion, discussed the question of the validity of the partition made by H. W. Vick and his son and held that the partition was good, and that the title of Henry G. Vick to the lands in controversy was perfect, and, as a consequence, that the defendant's title was also perfect; but this discussion was entered into for the purpose of showing that the title of the defendant was not so devoid of validity as to constitute a mere cloud on the title, and consequently that the case was not one in which a court of equity could give relief. We think, therefore, that the court below was right in determining that the decree in the equity case did not render the main controversy *res judicata*, but only decided that the bill would not lie. In other words, that it was not a proper case for a court of equity to determine the rights of the parties."

In disposing of the case on the merits, however, the learned justice, delivering the opinion of the entire court, adopted the opin-

ion of the supreme court of Mississippi as a satisfactory disposition thereof. In doing so he said:

339 "In disposing of the equity case on appeal, that court fully considered the power of the trustee, Henry W. Vick, both under the deed and under the will, and came to the unanimous conclusion that he had full power and authority to make the partition in question. As to the power under the will, the court had no doubt, and as to that given by the deed they relied on the authority of Abell *v.* Heathcote and the opinions of Sugden and Fearne; and, although this conclusion was not embraced in the decree so as to become *res judicata*, yet it was the ground on which the decree was rested."

Notwithstanding, then, that the decree was unqualified in its terms and rendered under the mandate of the Supreme Court of the United States, we are constrained to hold that it did not render the question in issue here *res judicata*.

If we have erred, we have the satisfaction of knowing that the amount in controversy gives the appellee the right to obtain a review of our decision.

For the reasons given, the judgment will be reversed with costs and the cause remanded, with direction to set aside the judgment rendered on the agreed statement and award a new trial. It is so ordered.

Reversed.

Chief Justice Alvey dissents.

340 TUESDAY, *February 6th, A. D.* 1900.

HORACE S. CUMMINGS, Appellant,
vs.
HENRY M. BAKER. } No. 898. January Term, 1900.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia and was argued by counsel; on consideration whereof it is now here ordered and adjudged by this court that the judgment of the said supreme court in this cause be, and the same is hereby, reversed with costs, and that this cause be, and the same is hereby, remanded to the said supreme court, with directions to set aside the judgment rendered on the agreed statement, and to award a new trial.

Per MR. JUSTICE SHEPARD.

February 6, 1900.

(Dissenting: Mr. Chief Justice Alvey.)

341 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 340, inclusive, contain a true

copy of the transcript of record and proceedings of said Court of Appeals in the case of Horace S. Cummings, appellant, *vs.* Henry M. Baker, No. 898, January term, 1900, as the same remains upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 12th day of February, A. D. 1900.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

342 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Being informed that there is now pending before you a suit in which Horace S. Cummings is appellant and Henry M. Baker is appellee, which suit was removed into the said Court of Appeals by virtue of an appeal from the supreme court of the District of Columbia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Court of Appeals and removed into the Supreme
343 Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the fifth day of March, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

344 [Endorsed:] Supreme Court of the United States. No. 533. October term, 1899. Henry M. Baker *vs.* Horace S. Cummings. Writ of certiorari.

345 In the Court of Appeals of the District of Columbia.

HORACE S. CUMMINGS, Appellant,
vs.
HENRY M. BAKER, Appellee. } No. 898.

It is stipulated and agreed between the undersigned, attorneys for the respective parties to the above-entitled cause, that the certified copy of the transcript of record herein filed in the Supreme Court of the United States in the case of Henry M. Baker, petitioner, *vs.* Horace S. Cummings, #533, October term, 1899, may be taken and considered as the return of this court to the writ of certiorari issued by the Supreme Court of the United States, dated March 5, 1900, in the cause above referred to.

CLARENCE A. BRANDENBURG,
Attorney for Appellant.
HOLMES CONRAD,
FRANKLIN H. MACKEY,
Attorneys for Appellee.

(Endorsed:) Court of Appeals, District of Columbia. No. 898. Horace S. Cummings, appellant, *vs.* Henry M. Baker. Stipulation as to return to writ of certiorari. Court of Appeals, District of Columbia. Filed Mar. 14, 1900. Robert Willett, clerk.

346 *Return to Writ of Certiorari.*

Court of Appeals of the District of Columbia.

In obedience to the command of the foregoing writ of certiorari and in pursuance of the stipulation of the parties, a full and true copy of which is hereto attached, I do hereby certify and return that the transcript of the record filed with the application to the Supreme Court of the United States for a writ of certiorari in the case of Horace S. Cummings, appellant, *vs.* Henry M. Baker is a full, true, and complete transcript of the record upon which said cause was heard in the Court of Appeals of the District of Columbia, together with all proceedings in said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 14th day of March, A. D. 1900.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

347 [Endorsed:] Case No. 17,647. Supreme Court U. S., October term, 1899. Term No., 533. Henry M. Baker, petitioner, *vs.* Horace S. Cummings. Writ of certiorari and return. Filed Mar. 15, 1900.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No.

HENRY M. BAKER, PETITIONER,

vs.

HORACE S. CUMMINGS, RESPONDENT.

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

Now comes Henry M. Baker, the petitioner above named, and respectfully prays for a writ of certiorari to the Court of Appeals of the District of Columbia requiring the above cause to be certified to this court for review and determination pursuant to act of Congress approved March 3, 1897 (29 Stats., 692), and represents:

1. That in the year 1874 petitioner and respondent formed a partnership under the firm name of Cummings & Baker for the conduct of business as attorneys in the prosecution of claims against the Government, which said partnership continued until September, 1889, when it was dissolved by

consent; that in the year 1889, shortly before the dissolution of the partnership, an account was stated between the petitioner and the respondent which showed an indebtedness on account of partnership matters due from the respondent to your petitioner amounting to $2,712.81; that thereafter, to wit, in December, 1889, after the dissolution of the partnership, petitioner instituted the action now presented for review in the supreme court of the District of Columbia, on its law side, to recover said sum, with interest from July 31, 1889. Thereafter, to wit, on February 1, 1890, before plea was due in said lawsuit, the respondent Cummings filed a bill in equity in said supreme court of the District of Columbia, wherein he alleged that among the items of business of the firm were cases known as "inspector cases;" that on September 6, 1886, the respondent had assigned to your petitioner in writing all his fees in such cases, and further alleged that said assignment was procured by fraudulent representations made by your petitioner. Said bill further alleged that this present lawsuit had been instituted; that all of the items mentioned in the particulars of demand annexed to your petitioner's declaration originated in and grew out of the partnership dealings of the partners, and that they did not constitute a full adjustment of the receipts of the members of said firm, and that only by a full, proper, and complete accounting and discovery could a proper adjustment be had of the rights and equities of the petitioner and respondent growing out of said partnership dealings. The bill further alleged that this action at law was not yet at issue, but that the time for pleading had nearly approached, and that the respondent Cummings could not, under the rules of pleading at law, incorporate in his plea the equitable defenses set forth in the bill, and which in a court of equity would prevail against your petitioner's demand, and especially that the respondent's right to have discovery and to have the assignment referred to canceled was not cognizable by a court

of law, and that if your petitioner, plaintiff in the present suit, should be permitted to prosecute the same against the respondent he would be deprived of his defenses, and that therefore he was entitled to have your petitioner enjoined from prosecuting this action at law. The bill therefore prayed for discovery, that the assignment referred to might be declared null and void, and that your petitioner might be enjoined from a further prosecution of this action, and that a complete accounting might be had in the equity court between your petitioner and the respondent in respect to the partnership dealings, and that your petitioner might be decreed to pay the respondent the amount found to be due him.

2. That in consequence of the filing of said bill for an injunction and accounting all proceedings in this action were suspended, and in the progress of said equity cause the supreme court of the District of Columbia held that your petitioner was indebted to the respondent in the sum of between thirty and forty thousand dollars, credit being allowed your petitioner in said accounting for the amount claimed in this action; that from the decree of the supreme court of the District of Columbia an appeal was prosecuted to the Court of Appeals of the District of Columbia, which affirmed the decree of the court below (8 App. D. C., 515). From the decree of the Court of Appeals of the District of Columbia affirming the decree of the supreme court of the District of Columbia an appeal was prosecuted to this court, which, on February 21, 1898 (169 U. S., 189), reversed the decree of the ~~supreme court~~ Court of Appeals of the District of Columbia and remanded the case, with instructions to set aside the decree of the supreme court of the District of Columbia and to remand the same to that court with instructions to dismiss the bill; that thereafter the Court of Appeals of the District of Columbia did remand the case to the Supreme Court of the District of Columbia, and that court thereafter, on the 18th

day of April, 1898, passed its final decree, pursuant to the mandate of this court, dismissing the bill of the respondent Cummings.

3. That on the 10th day of February, 1892, more than two years after the institution of said equity cause to restrain this action at law, and while said equity case was still pending, the respondent Cummings filed his pleas in this action, in which he sought to offset the amount of the plaintiff's claim and to recover from him an alleged indebtedness of $35,873 35, being the identical items set up and claimed in said equity cause; that nothing further was done in this action at law in consequence of the pendency of said equity cause until after the determination of the same by this court (169 U. S., 189), whereupon the cause proceeded to issue, your petitioner replying to the respondent's pleas of set-off, which claimed the identical sums for which he had obtained a decree in said equity cause, and which had been dismissed by this court, that the same were *adjudicata* by reason of the decree of this court.

4. Thereafter, the respondent admitting his indebtedness to your petitioner in the amount claimed in this action at law, the following stipulation was entered into between your petitioner and the respondent:

"It is hereby stipulated and agreed by and between the parties to this cause, by their respective attorneys, that this cause may be tried by the court without a jury, the parties hereby expressly waiving the same, upon the following agreed statement of facts, subject to the limitations herein contained.

"That on the 31st day of July, A. D. 1889, and for a long time prior thereto, the plaintiff and the defendant were copartners engaged as attorneys in the prosecution of claims against the United States, the net fees derived therefrom being under the contract of partnership equally to be divided between them, the said partners; that on the 19th day of December, A. D. 1889, the plaintiff instituted this

action to recover the sum of $2,712.81, with interest from the 31st day of July, A. D. 1889; that the said sum is the identical sum referred to on pages 227 and 248 of the record on appeal to the Supreme Court of the United States in the equity cause hereinafter referred to (pages 255 and 277 of the record herewith submitted); that after the institution of this suit the defendant herein instituted a certain equity proceeding against the plaintiff herein in the supreme court of the District of Columbia, the same being known and numbered on the docket of said court as equity cause No. 12263. The record, decrees, and opinions of the respective courts therein, both in this and the appellate courts, are hereby referred to and made part hereof; that the several items of account set forth in the pleas of set off herein are respectively the identical items set up, referred to, and claimed in said equity cause.

"If the court on inspection of said record and proceedings in said equity cause of the record and proceedings of this cause shall be of opinion that the defendant herein may not set up in bar of the plaintiff's action any of said items of set-off and counter-claim as pleaded in this action, but is concluded by the proceedings and decree in said equity cause, then this court may enter judgment for the plaintiff in this action for the sum of $2,712.81, with interest thereon from the 31st day of July, A. D. 1889, as claimed in his declaration herein; but if the court shall be of opinion that any of said items of set-off and counter-claim may be set up in bar of the plaintiff's action herein, then this cause shall be remanded to the docket for trial by jury. Both parties hereto reserve the right of appeal or by writ of error from the judgment of this court or of any court of review passing hereon, and also any other remedy which they may by law be entitled to."

5. That this action came on to be heard before Chief Justice Bingham, holding the supreme court of the District of Columbia, who, on March 27, 1899, being of opinion that the respondent Cummings was concluded as to all of the items embraced in his plea of set-off in this action by the decree of this court in the equity case, brought to restrain this action, rendered judgment in favor of your petitioner

against Cummings in accordance with the terms of the stipulation.

6. That from the judgment of said court in favor of your petitioner an appeal was prosecuted to the Court of Appeals of the District of Columbia, which said court on the 6th day of February, 1899, by a majority opinion (Justices Morris and Shepard), Chief Justice Alvey dissenting, reversed the judgment of the supreme court of the District of Columbia and held that the decree of this court in said equity cause did not conclude the respondent as to the several matters therein litigated, and that he has the right in this action to litigate anew and set up and claim again the identical sums for which he obtained a decree in said equity cause.

7. That in its opinion, delivered by Justice Shepard, as by reference thereto will appear (page 319 of record, herewith submitted), the court said:

"The sole question involved in this appeal is the sufficiency of the appellee's (your petitioner's) defense of former adjudication of that issue founded on the decree in the equity branch of the case. * * * The application of this general principle (*res adjudicata*) to the peculiar features of this case shown by this record, presents a question of *grave difficulty*, involving as it does also the *delicate task of defining the scope of a general decree entered in pursuance of a mandate of the Supreme Court of the United States.* * * * Notwithstanding the dismissal was ordered and entered without words of qualification, the appellant contends that the opinion of the Supreme Court may be resorted to for the ascertainment of the grounds and limitation of the scope of that decree. In this we concur. * * * It now remains to ascertain the question actually determined by the Supreme Court in the equity case of Baker *vs.* Cummings, 169 U. S., 189. Was that decision an adjudication of the merits of the case? * * * Notwithstanding then that the decree was unqualified in its terms and rendered under a

mandate of the Supreme Court of the United States, we are constrained to hold that it did not render the question in issue here *res adjudicata.*

"If we have erred, we have the satisfaction of knowing that the amount in controversy gives the appellee the right, without restriction, to obtain a review of our decision."

8. Your petitioner is advised that said justice assumed, inasmuch as the effect of the decision is to subject your petitioner to liability for more than thirty-five thousand dollars for the same amounts for which the respondent recovered a decree against him in said equity cause, that your petitioner has an unfettered right of appeal, but your petitioner is advised said court is in error in that respect.

9. Your petitioner represents that, as by reference to said opinion will appear, the entire controversy in this case arises over the construction and effect of an opinion and an unqualified decree of this court in said equity cause; that doubt exists as to the correct construction and effect thereof, two justices of the supreme court of the District of Columbia, as appears by reference to the appendix to the brief filed in the court below and herewith presented as part hereof, holding that the decision of this court is conclusive between the parties hereto, and that this view has been concurred in by Chief Justice Alvey, who dissented from the majority opinion of the Court of Appeals, thus presenting a case in which three judges have decided in favor of your petitioner's view of the opinion and decree of this court and two against it.

10. Your petitioner represents that by reference to the opinion of this court in said equity case (169 U. S., 189) it will appear that all of the matters involved in this suit were in that suit expressly and distinctly litigated, considered by the court, and decided; that the court had jurisdiction of the subject-matter, and that it took jurisdiction at the request of

the respondent, who voluntarily transferred to the equity branch of the court the settlement of partnership matters, and although this court in its opinion in said equity cause reviewed all of the testimony in the case and distinctly decided the very matters sought to be put in issue in this case, and although the decree dismissing the bill was a general decree, without words of qualification, nevertheless the majority of the Court of Appeals of the District of Columbia considered that because this court in the concluding portion of its opinion stated that it preferred to rest its decision upon the ground of laches, that the effect of the decree of this court was to decide the single question that the respondent had no right to file a bill to cancel the assignment, and that therefore he may in this suit again litigate the validity of said assignment, assail it on the ground of fraud, and recover from your petitioner in this action the identical amount for the identical items for which he recovered a decree in said equity cause; whereby and by reason thereof your petitioner is wholly deprived of any benefit whatever of the judgment of this court, rendered on final hearing in the case in which it had jurisdiction between the same parties and upon the same subject-matter, after more than eight years of litigation.

Your petitioner therefore respectfully prays that the writ of certiorari may issue to the Court of Appeals of the District of Columbia to bring this cause to this court for review and determination.

Notice of this application has been given to opposing counsel.

HENRY M. BAKER.

CLARENCE A. BRANDENBURG,
Counsel for Petitioner.

DISTRICT OF COLUMBIA, *ss*:

I, Henry M. Baker, do solemnly swear that I have read the foregoing petition by me subscribed, and that I know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and those stated upon information and belief I believe to be true.

HENRY M. BAKER.

Subscribed and sworn to before me this 12th day of February, 1900.

FERDINAND SCHMIDT,
Notary Public.

[SEAL.]

IN THE

Court of Appeals of the District of Columbia

HORACE S. CUMMINGS,
Appellant,

vs.

HENRY M. BAKER,
Appellee.

No. 898.

STATEMENT OF FACTS.

About the year 1875, Horace S. Cummings and the appellee, Henry M. Baker, formed a partnership under the firm name of Cummings & Baker, for the conduct of business as attorneys in the prosecution of claims against the Government. The agreement of partnership was verbal and was dissolvable at the pleasure of either party The partners were to share equally in the profits and losses of the business. They remained in partnership until September, 1889, when the firm was dissolved. In July, 1889, shortly before the dissolution of the partnership, an account was stated between the appellant and the appellee, which showed a balance due from Cummings to Baker, amounting to $2,712.81. In December, 1889, after the dissolution of the partnership, Baker brought this suit at law against Cummings to recover said sum of $2,712.81 due him upon the account stated between them. On February 1, 1890, before plea was due in the law suit mentioned, Cummings, the defendant in the law suit, filed a bill in equity in the Supreme Court of the District of Columbia, the same being found on page 27 of the Record.

The bill alleged that about the 1st of January, 1876, Cummings and Baker entered into a partnership by parol to prosecute claims against the Government of the United States and that it continued until September, 1889, when it was dissolved, and that among the items of business of the firm were cases known as "inspector cases," of which the firm had a great many. The bill further alleged that on September 5, 1886, Cummings assigned to Baker in writing all his interest in the fees of such so-called "inspector cases," including those in which the fees had not been divided, excepting two cases only, whether paid or unpaid, filed or outstanding. The bill further alleged that this assignment was procured by fraudulent representations made by Baker. It further alleged that this present law suit had been instituted in the District of Columbia; that all of the items mentioned in the bill of particulars annexed to the declaration therein, originated in and grew out of the partnership dealings of the parties, and that they did not constitute a full adjustment of the receipts of said Cummings and of said Baker, and that only by a full, proper and complete accounting and discovery under the order and direction of a court of equity could a proper adjustment be had of the rights and equities of the complainant and defendant growing out of their partnership dealings. The bill further alleged that this suit at law was not yet at issue, but that the time for pleading had nearly approached and that the complainant Cummings, could not, under the rules of pleading at law, incorporate in his plea the equitable defenses set forth in the bill and which in a court of equity would prevail against Baker's demand, and especially that the plaintiff's equitable right to have discovery and to have the assignment referred to canceled, was not cognizable by a court of law; and that if the plaintiff in the law suit, Baker, was permitted to prosecute said suit against Cummings, he, Cummings, would be deprived of his defenses, and that therefore he was entitled to have Baker enjoined from the prosecution of said suit at law. The bill there-

fore prayed for discovery, that the assignment referred to might be declared null aud void and that Baker should be enjoined from the further prosecution of this suit at law, and that a complete account might be had in the equity court between Baker and Cummings in respect of the partnership dealings, and Baker be decreed to pay Cummings the amount found to be due him.

Because of the filing of this suit all proceedings in the law suit were suspended. In the progress of the litigation in the equity suit, the court below held that Baker was indebted to Cummings in a sum of between thirty and forty thousand dollars, after allowing Baker a credit for the sum of $2,712.81 claimed in the law suit. From the decree of the Supreme Court of the District of Columbia an appeal was prosecuted to this court, which affirmed the decree of the court below. 8 App. D. C. 515. From the decree of this court affirming the decree of the Supreme Court of the District of Columbia, an appeal was prosecuted to the Supreme Court of the United States and that court on February 21, 1898, reversed the decree of this court and remanded the case with instructions to set aside the decree of the Supreme Court of the District of Columbia and to remand the same to that court with instructions to dismiss the bill. Thereafter, this court did remand the case to the Supreme Court of the District of Columbia with the instructions stated and that court thereafter, on the 18th day of April, 1898, passed its final decree pursuant to the mandate of this court dismissing the bill of Cummings.

On the 10th day of February, 1892, pending the disposition of the equity case referred to, Cummings filed pleas to this law suit (page 4 of the Record), the only ones which it is necessary to consider, being the 4th and 5th, in which the defendant Cummings sought to offset the amount of the plaintiff's claim by an alleged indebtedness of $35,873.35. Nothing further was done in the law case until June 16, 1898, after the dismissal of the equity case referred to by the Supreme Court of the District of Columbia when Baker

filed the replications found on page 15 of the Record. To the pleas of set-off, with leave of court, Baker pleaded, first, limitations, secondly, that in consideration of $15,000 Cummings had on the 6th day of September, 1886, assigned to him all his interest in the "inspector cases" and that the amount claimed in the set-off filed by Cummings was part of the fees received by Baker in the prosecution of the "inspector cases" covered by the assignment of Cummings; and fourth, that after the execution of the assignment, Cummings instituted the equity suit referred to in which by decree passed therein, he recovered from Cummings the sum of $32,772.14 for the identical items claimed in the defendant's plea of set-off, and that said decree was thereafter reversed and the complainant's bill dismissed generally, and that therefore the right of the defendant to set off such items was *res adjudicata*. To these pleas Cummings replied, first, denying that there was any consideration for the assignment, and second, that the assignment was obtained by fraudulent concealment and misrepresentation. The defendant rejoined that the matters therein referred to were *res adjudicata* by reason of the decree of the court in the equity case referred to. To these pleas of *res adjudicata* Cummings responded (p. 20 of the Record), that the Supreme Court of the United States in its *opinion* expressly refused to decide whether the assignment was without consideration and void, and whether the assignment was obtained by fraudulent concealment and misrepresentation. To these pleas Cummings demurred. The demurrer was sustained, Justice Cole rendering the opinion found in the appendix to this brief. Thereafter issue was joined in due course. After issue was joined, the stipulation (p. 23 of the Record) was entered into between the parties to the suit, wherein it is agreed that the sum claimed in the law suit is the identical sum referred to on pages 227 and 248 of the Record on appeal to the Supreme Court of the United States in the equity case referred to. By reference to the Record on appeal to the Supreme Court of the United States it will be noticed that on page 227 in

the hearing before the auditor in the equity case, Mr. Mackey, on behalf of Mr. Cummings, admitted that Mr. Baker was entitled to recover from Cummings the sum claimed in the law suit, and on page 248 of said Record, Cummings himself, when testifying before the auditor, stated as follows:

> "Mr. Baker and I agreed in regard to these cases—in regard to the fees due to him and the fees due to me and in the final agreement, in regard to these fees—there was an amount due to him, the sum of $2,700 and that he claims credit for in his account, which I admit."

The stipulation further recites that after the institution of this law suit Cummings instituted the equity proceedings referred to against Baker and that the several items of account set forth in the pleas of set-off filed in this law suit are respectively the identical items set up, referred to and claimed in said equity cause.

The stipulation further provided that if the court on inspection of the Record and proceedings in said equity cause and of the Record and proceedings in this cause, should be of opinion that Cummings may not set up in bar of Baker's action any of the items of set-off and counterclaim as claimed in this action, but is concluded by the proceedings and decree in the equity cause, then that the court might enter judgment for Baker against Cummings for the sum of $2,712.81, with interest from July 31, 1889, as claimed in the declaration, but if the court should be of opinion that any of said items of set-off and counterclaim might be set up in bar of the plaintiff's action herein, then that this case should be remanded to the docket for trial by jury.

Upon this stipulation the cause came on for hearing before Chief Justice Bingham on March 27, 1899, who, being of the opinion that Cummings was concluded as to all of the items embraced in his plea of set-off by the decree in the equity cause, rendered judgment in favor of Baker

against Cummings in accordance with the terms of the stipulation.

From that judgment Cummings has prosecuted this appeal and, as required by the terms of the stipulation, has made part of the Record, the Record on appeal in the equity case referred to.

BRIEF.

The scope of the issues in this case has been very much narrowed by the stipulation (p. 23 of the Record). By that stipulation it is agreed that if—

> "the defendant herein may not set up in bar of the plaintiff's action any of said items of set-off and counterclaim as pleaded in this action, but is concluded by the proceedings and decree in said equity cause, then this court may enter judgment for the plaintiff . . . but if the court shall be of opinion that any of said items of set-off or counter-claim may be set up in bar of the plaintiff's action herein, then this cause shall be remanded to the docket for trial by jury."

From this stipulation, therefore, it is apparent that if the several items of set-off and counterclaim as pleaded in this action are *adjudicata* by reason of the decree of the court in the equity case, the judgment of the court below should be affirmed.

It is important, therefore, to determine whether the Record, proceedings and decree in the equity cause embraced all of the elements necessary to render *adjudicata* the items of set-off filed in this action.

In Lyon *vs.* The Perrin & Gaff Mfg. Co., 125 U. S. 698, the court said:

> "It is well settled that in order to render a matter *res adjudicata*, there must be a concurrence of four conditions, viz.: (1) Identity in the thing sued for; (2) Identity of the cause of action; (3) Identity of

> persons and parties to the action; and (4) Identity of the quality in the persons for or against whom the claim is made."

The Supreme Court of the United States in Durant *vs.* The Essex Co., 7 Wall. 107, added to the elements essentials to sustain a plea of *res adjudicata* enumerated in Lyon *vs.* The Perrin & Gaff. Mfg. Co., *supra*, the requirement that the decree must be upon the merits. The court stated:

> "The decree dismissing the bill in the former suit in the Circuit Court of the United States being absolute in its terms, was an adjudication of the merits of the controversy, and constitutes a bar to any further litigation of the same subject between the same parties. A decree of that kind, unless made because of some defect in the pleadings, or for want of jurisdiction, or because the complainant has an adequate remedy at law, or upon some other ground which does not go to the merits, is a final determination."

Whether the plea of *res adjudicata* in this case concludes the defendant as to his plea of set-off will therefore be determined by ascertaining if the elements essential to the maintenance of such plea, as determined by the Supreme Court of the United States in the foregoing decisions, are found to be present.

The identity of the cause of action and of the thing sued for and the identity of the parties to the action, are all admitted by the stipulation, found on page 23 of the Record. By reference to that stipulation, it will be seen—

> "that the several items of account set forth in the pleas of set-off herein, are respectively the *identical* sums set up, referred to and claimed in said equity cause."

The stipulation also admits the identity of the parties and that in both proceedings Cummings sought to recover from Baker the amount of said several items. The fourth essential pointed out in Lyon *vs.* Perrin, "identity of the quality

in the persons for or against whom the claim is made," sufficiently appears from the stipulation also.

If, therefore, the decree of the Supreme Court of the United States was not made "because of some defect in the pleadings, or because the complainant has an adequate remedy at law, or upon some other ground which does not go to the merits," it is a final determination. Durant *vs.* Essex Co., *supra.*

It is perfectly clear that the decree in the equity case was not made "because of some defect in the pleadings." Nor was it made "for want of jurisdiction or because the complainant had an adequate remedy at law." It will be remembered that Cummings himself appealed to the court of equity and asserted its jurisdiction, as a basis for relief, in the following manner (p. 31, Record):

> "And complainant avers that all of the items in the said bill of particulars originate in and grow out of the partnership dealings of the parties, and not otherwise, and that the said items do not constitute a full adjustment of the rights of this complainant and the said defendant, and that only by a full, proper, and complete accounting and discovery under the order and direction of a court of equity could a proper adjustment be had of the rights and equities of the complainant and defendant growing out of their partnership dealings. That the said suit at law is not yet at issue, but that the time for pleading thereto has nearly approached, and that the complainant can not under the rules of pleading at law incorporate in his plea the equitable defenses herein set forth, and which in a court of equity would prevail against the defendant's demand, and especially is the equitable right of the complainant to have discovery in the premises and to have the said assignment canceled and held for naught, a matter not cognizable by a court of law, and if the defendant were, therefore, permitted to prosecute his said suit at law against complainant this complainant would be deprived of his defenses to said suit now pending as aforesaid, and that the complainant is therefore

> entitled to have the defendant enjoined from prosecuting his said suit at law and to have this court order and direct a full and complete accounting becounting between complainant and defendant in respect of their partnership dealings as aforesaid."

In Case *vs.* Beauregard, *supra*, as in this case, after availing himself of his equitable remedy on the distinct ground that he had no remedy at law, the defendant sought to avail himself of the same defense thereafter at law, and in considering this position, the court said:

> "The bill in that case asserted, in the most ample terms, the remidilessness of the complainant at law. It averred that at and before the transfer and conveyances of the partnership property, sought to be charged, to the railroad company, each of the members of the partnership was largely indebted, without means, and in a state of insolvency, and that they had since been and still were insolvent; so that a suit at law and the recovery of a judgment against them, or ether of them, would not afford the complainant any relief, because neither of the partners have or had, since the dates of the pretended transfers of said partnership property, any property whatever upon which the complainant could levy an execution at law, or seize for the satisfaction of the debt due to the bank. What more could have been necessary to show that the complainant had no remedy at law; that his remedy, if he had any, was in equity."

In view of these allegations, the court did take jurisdiction and the parties proceeded to their proofs. The jurisdiction of the equity court was not and can not now be questioned.

The Decree of the Supreme Court of the United States was Upon the Merits.

Was then the decree of the Supreme Court of the United States "upon some other ground which does not go to the merits?"

The primary contention of the attorney for appellant is, that in order to determine if the decree of the Supreme Court was upon the merits, we may look to its opinion. We respectfully submit, on the other hand, that recourse may be had to the opinion of the court *only* when the record and decree leave the matter in doubt. The decree itself is the sentence of the law and it can not be restricted or qualified by the opinion filed in the case. The record and decree in this case leave no doubt whatever upon the subject. The very object of the appellant in seeking to refer to the opinion is to *raise a doubt*, because it is obvious the very doubt which he claims to exist, is found in the opinion itself and *not* in the record or decree.

The authorities seem to remove all question upon the subject.

In Campbell et al. *vs.* Rankin, 9 Otto, 261, considering a similar proposition as that here maintained, the court said:

> "The issue in both cases was, to which claim the disputed piece of mineral deposit belonged and *if that issue was not clear*, it was competent under the decisions we have cited, to show by parol proof that the controversy was over the same locality and that the issue had therefore been decided against Rankin."

The matter seems to have been specifically and definitely decided in Davis *vs.* Brown, 94 U. S. 423, where the court said:

> "When a judgment is offered in evidence in a subsequent action between the same parties upon a *different demand*, it operates as an estoppel only upon the matter actually at issue and determined in the original action; and such matter, *when not disclosed by the pleadings*, must be shown by extrinsic evidence."

Again, in Russell *vs.* Place, 94 U. S. 606, the court said:

> "If there be an uncertainty on this head of the Record . . . the whole subject matter of the action will be at large and open to a new contention unless this uncertainty be removed by extrinsic evi-

> dence showing the precise point involved and determined. To apply the judgment and give effect to the adjudication actually made, *when the Record leaves the matter in doubt*, such evidence is admissible"

We therefore submit that recourse can not be had to the opinion of the court in this case inasmuch as the matter at issue "is not left in doubt."

The Opinion of the Supreme Court.

Although the right to do so is denied, yet, for the sake of argument, assuming the right exists, an examination of the opinions of the Supreme Court, of the Court of Appeals of the District of Columbia and of the Supreme Court of the District of Columbia plainly reveals that the merits of the controversy were in issue, were considered and decided.

Cummings filed his bill in equity for an accounting claiming that he had no adequate remedy at law, took a mass of testimony, had several references to the auditor and actually recovered a decree against Baker for the identical items of set-off which he now seeks to recover in this action. To permit him to again litigate the same matter in this court after a decree in the equity court would, it seems to us, be a travesty upon justice.

It is an undisputed maxim of the law that *nemo debet bis vexari pro una et eadem causa.* This doctrine seems to be particularly applicable to this suit as the said equity cause "vexed" the parties to it for more than eight years. The equity cause was based upon allegations by Cummings that Baker had defrauded him in various ways in the purchase of his rights in sundry cases and the fees resulting therefrom, said cases being technically known as "inspector cases," and secondly, that in paying him for them Baker had used funds to which Cummings was entitled and hence that the sale was void for want of consideration. To show that Cummings relied on the first of these contentions, reference can be made to the Record, pages 7, 29, 30, 31, 48, 58, 68, 80, 81, 83, 84, 116, 121, 243 and others, and to

show that he relied on the second claim, namely, that Cummings was paid from his own money, pages 30, 47, 84, 237, 238, 246, 247 and others.

If a second suit or action is brought for the same cause as the first one, as this is, it naturally follows that it will be sustained by the same evidence. The present defendant has pleaded nothing he did not put in evidence in the suit which was determined by the United States Supreme Court and suggests no evidence that was not fully considered by that and by the other courts which passed upon the equity suit. That being so, his present contention must be to get a reconsideration of matters already pleaded and decided, and hence *adjudicata.* The consideration of the Record made part of this case by the stipulation reveals this beyond doubt. Reference to the defendant's brief filed in the equity case will show that he relied solely upon the points of fraud and no compensation to secure a decree in his favor as to the very self-same items covered by the off-set pleaded herein, and reference to the opinion of Mr. Justice Hagner, (Record, pages 234 to 245), and to the opinion of Chief Justice Alvey, of the Court of Appeals (pages 246 and 247 of Record), shows that these two "points" were especially considered by them and that the decree entered in the Supreme Court of the District of Columbia and in the Court of Appeals of the District of Columbia was strictly based upon the allegations and proofs of fraud and failure of compensation based upon the finding that Cummings "was paid from his own money."

And the Supreme Court of the United States specifically and distinctly considered both of these points and after stating the findings in the courts below (169 U. S. 207), decided both of them adversely to Cummings. It said: "But neither of these views meet with our approbation," and then considers both of them at length and adds—

> "to say then that Cummings was paid by his own money necessitates deciding that the fraud was established as alleged by Cummings"—

and closes by saying—

> "because we rest our conclusion upon the application of the bar of the statutes and the *laches* of Cummings, *we must not* be considered *as intimating* that we conclude that there was either clear and convincing proof or even a preponderance of proof that the sale was as claimed by Cummings."

This expressive language of the court becomes more emphatic when we remember that the court early in its decision, said:

> "In entering upon an analysis of the evidence upon this particular subject, we shall be governed by the principle determined by this court in numerous cases, of which Stuart *vs.* Hayden, 169 U. S., decided at the present term, is the last expression, that when two courts reach the same conclusion on a question of fact, their finding will not be disturbed unless it be clear that their conclusion was erroneous.'

The two courts below had both found "fraud," and that Baker had paid Cummings "from his own money" for his interest in the inspector cases bought of him. These findings the Supreme Court of the United States declared to be clearly erroneous as that part of the opinion just quoted and the discussion of the facts of the case, which follows, unmistakably demonstrates.

That the decree of the Supreme Court of the United States did not finally settle all the matters upon which the suit of Cummings *vs.* Baker was instituted and prosecuted, it seems to us is very difficult to maintain. That Cummings is estopped by that decree from having considered in the pending suit either the claim of "fraud" or of "no consideration" as to items of account determined by that equity suit, seems quite clear, inasmuch as those contentions have certainly been decided by a court of competent jurisdiction, upon the merits, in a cause instituted by Cummings, expressly alleging that the court had jurisdiction, and possessing the four elements of identity essential to constitute *res adjudicata.*

As we have shown, the Supreme Court of the United States as a matter of fact fully considered and discussed at length the evidence in the case relating to "fraud" and "no consideration," but in its opinion stated that it preferred to rest its decision upon the bar of limitations. Giving then the very narrowest and most unreasonable construction and effect to the decree and opinion of the Supreme Court of the United States, at the very least, it certainly decided that Cummings was barred by limitations from maintaining his suit to set aside the assignment on any ground whatever. Is a decision upon such a ground a decision on the merits?

In the work of the present attorney for the appellant, Mackey's Practice and Procedure relating to the District of Columbia, page 29, the nature of such a plea is stated as follows:

> "The plea of the Statute of Limitations is now regarded with the same effect as other legal defenses."

The defense of limitations is now regarded as a meritorious one.

Knodeler *vs.* Meloy, 2 MacA. 239.
Clemenson *vs.* Williams, 8 Cranch, 172.
Bell *vs.* Morrison, 1 Pet. 351.
M'Cluny *vs.* Silliman, 3 Pet. 270.
United States *vs.* Wilder, 13 Wall. 254.

Statutes of Limitations are now favorably considered. They are "statutes of repose."

Leffingwell *vs.* Warren, 2 Black, 599.
Thompson *vs.* Shepherd, 122 U. S. 231.

In Knodeler *vs.* Meloy, *supra*, in considering the nature of the plea of limitations, the Supreme Court of the District of Columbia held:

> "The plea is now regarded with the same favor as other defenses. The ancient prejudices have passed

away and the prevalence of judicial opinion is now in favor of a just and reasonable construction of the statute. The Supreme Court of the United States have sanctioned this doctrine perhaps more clearly than any other tribunal. In Clemenson *vs.* Williams, 8 Cranch 72, Chief Justice Marshall declares that 'the Statute of Limitations is entitled to the same respect with other statutes and ought not to be explained away.' In Bell *vs.* Morrison, 1 Pet. 351, the language of the court is still more expressive, Mr. Justice Story saying that: 'It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands, after the true state of the transaction may have been forgotton, or be incapable of explanation, by reason of the death or removal of the witnesses.'

"To the same effect are M'Cluny *vs.* Silliman, 13 Pet. 270 and U. S. *vs.* Wilder, 13 Wall. 254. The expediency and justice of the act of limitations are now generally recognized and the authority of decisions discordant with its policy have been greatly impaired."

In Wood *vs.* Carpenter, 101 U. S. 139, where the defense of limitation was interposed to a suit to vacate certain conveyances on the ground of fraud, the plea was sustained and the court said:

"Statutes of Limitations are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together."

It is obvious, therefore, that restricting the scope of the

opinion and the decree of the Supreme Court, and giving it the most limited effect, it is nevertheless a decree upon the merits of the controversy between these parties.

The Effect of the Decree is Not Limited to the Issue Decided.

The contention of the solicitor for the complainant, however, is, that this court must limit the effect of the decree to the "issue" decided, which, as he claims, is the right of the appellant to set aside the assignment of fees. And to sustain this view he cites several decisions of State courts.

On the other hand, we contend, the decision of the Supreme Court of the United States having been upon the merits, as we have shown, is conclusive as to all questions, not only the issues decided but those which might have been decided, not only those raised but those which might have been raised.

In the first place, all the authorities say that if the second suit is between the same parties and upon the *same subject-matter*, every question which might have been decided in the first suit is considered as concluded by that suit.

The reference to the case of Aurora City *vs.* West, 7 Wallace, quoted by counsel for defendant is to a *dissenting* opinion of Justice Miller. Moreover, Justice Miller made the same mistake that counsel is now making and it subsequently became necessary for the Supreme Court of the United States to elaborately explain the distinction. But the majority of the Supreme Court in that case, Justice Miller alone dissenting, in its opinion expressly decided that the view now contended for is the correct one as the court will see by reference to that opinion.

The distinction is this, that if the second suit is between the same parties upon the *same subject matter*, the first suit concludes everything which *might* have been litigated. If the second suit between the same parties but upon a *different subject matter*, the first suit concludes only such matters as

were *in issue* in the first suit. As finally settling the entire matter, we submit, we beg to quote from the opinion of Justice Field, in Cromwell *vs.* Sac County, 94 U. S. 351.

> "In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action *upon the same claim or demand* and its effect as an estoppel in another action between the same parties upon a *different claim or cause of action.* In the former case the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, including parties and those in privity with them, not only as to *every* matter which was offered and received to sustain or defeat the claim or demand *but as to any other admissible matter which might have been offered for that purpose.* . . . The language therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate when applied to the demand or claim in controversy; such demand or claim, having passed into judgment, can not again be brought into litigation between the parties in proceedings at law, upon any ground whatever. But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon *a different cause of action,* inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action. The difference in the operation of a judgment in the two classes of cases mentioned is seen through all the leading adjudications upon the doctrine of estoppel."

Again, in Davis *vs.* Brown, 94 U. S., 423 the court said:

> "In taking this position, counse have confounded the operation of a judgment upon the demand involved in the action, in which the judgment was rendered, with its operation as an estoppel in another action between the parties upon a *different demand*. So far as the demand involved in the action is concerned, the judgment has closed *all controversy*; its validity is no longer open to contestation, whatever might have been said or proved at the trial for or against it. The judgment is not only conclusive as to what was actually determined respecting such demand, but as to every matter which might have been brought forward and determined respecting it,
>
> . . .
>
> "When a judgment is offered in evidence in a subsequent action between the same parties *upon a different demand*, it operates as an estoppel only upon the matter actually at issue and determined in the original action; and such matters, when not disclosed by the pleadings, must be shown by extrinsic evidence."

The same thing was decided as late as 1893 by Justice Harlan, on behalf of the court, in Dowell *vs.* Applegate, 152 U. S. 327.

It follows therefore, assuming that the questions of fraud and no consideration were not in issue in the case, and were not decided, and restricting the opinion and decree to a decision upon the matter of limitations merely, and a decision on the question of limitations being now considered a decision on the merits, the decree of the Supreme Court of the United States concludes the appellant upon the issues of "fraud" and "no consideration" even if he did not present them because they might have been presented in the case.

The Decree Conclusively Presumed to be on the Merits.

It will be noted that the decree of the Supreme Court of the United States, and that of the Supreme Court of the District of Columbia made pursuant thereto, was a general

decree of dismissal without words of qualification. We submit that the decree, therefore, is *conclusively* presumed to be upon the merits.

In Durant *vs.* Essex Co., 7 Wall. 107, Justice Field said:

> "The decree dismissing the bill in the former suit in the Circuit Court of the United States being absolute in its terms, was an adjudication of the merits of the controversy, and constitutes a bar to any further litigation of the same subject between the same parties. A decree of that kind, unless made because of some defect in the pleadings, or for want of jurisdiction, or because the complainant has an adequate remedy at law, or upon some other ground which does not go to the merits, is a final determination. Where words of qualification, such as 'without prejudice,' or other terms indicating a right or privilege to take further legal proceedings on the subject, do not accompany the decree, it is presumed to be rendered on its merits. Walden *vs.* Bodley, 14 Pet. 156; Hughes *vs.* United States, 4 Wall. 237; Bigelow *vs.* Winsor, 1 Gray, 301; Foote *vs.* Gibbs, 1 Gray, 412.
>
> "Accordingly, it is the general practice in this country and in England, when a bill in equity is dismissed without a consideration of the merits, for the court to express in its decree that the dismissal is without prejudice. The omission of the qualification in a proper case will be corrected by this court on appeal. Lindsay *vs.* Lynch, 2 Sch. & Lef. 10; Woollam *vs.* Hearn, 7 Ves. 222; Stevens *vs.* Guppy, 3 Russ. 185; Sewall *vs.* Eastern RR. Co., 9 Cush. 13; Miles *vs.* Caldwell, 2 Wall. 45; Carneal *vs.* Banks, 10 Wheat. 192; Dandridge *vs.* Washington, 2 Pet. 378; Peirsoll *vs.* Elliott, 6 Pet. 100; Gaylord *vs.* Kelshaw, 1 Wall. 83; Barney *vs.* Baltimore, 6 Wall. 289; Hobson *vs.* McArthur, 16 Pet. 195."

In Case *vs.* Beauregard, 11 Otto, 688, the court said:

> "Thus it appears, the bill exhibited all that was necessary to give to the court, sitting as a court of equity, complete jurisdiction over the subject of the controversy between the parties, and over all the equities now asserted by the complainant in his

present suit. It must, therefore, be held that the decree dismissing that bill determined the equities of the case. And this must be so, whether the reasons for the dismissal were sound or not. That decree was affirmed in this court and affirmed on the merits. We regarded the case and treated it as requiring an adjudication upon the complainant's equity to be paid out of the property in the hands of the railroad company. Nothing that can now be done in another suit can take away the legal effect of the decree. Even were we of opinion that the case was erroneously decided, it would still be *res judicata*, a bar to the complainant, a protection to the defendants."

In Lyon *vs.* The Perrin & Gaff Mfg. Co., 125 U. S. 698, the court said:

"It is well settled that in order to render a matter *res adjudicata*, there must be a concurrence of the four conditions, viz: (1) Identity in the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; and (4) identity of the quality in the persons for or against whom the claim is made. 2 Bouv. L. D. 467. All of these elements or conditions exist in this case, as shown by the master's report, which was to the effect that the averments of said plea were sustained by the evidence; that there was no controversy as to the identity of the cause of the action, or of the identity of the parties in the two suits; that the bill was sworn to by the complainant, and the answer was sworn to by the defendant, and the cause submitted in due course; and that the decree rendered in the suit pending in the court of Ohio was, as it professed to be, an absolute adjudication of the rights of the parties upon the merits, without any qualifying cause and was conclusive of the rights attempted to be litigated in this case.

. . . . . .

"This decree on its face is absolute in its terms, is an adjudication of the merits of the controversy, and, therefore, constitutes a bar to any further litigation

of the same subject between the same parties. As was said by this court in Durant *vs.* Essex Company, 74 U. S. 107, 109: 'A decree of that kind, unless made because of some defect in the pleadings, or for want of jurisdiction, or because the complainant has an adequate remedy at law, or upon some other ground which does not go to the merits, is a final determination. Where words of qualification, such as "without prejudice," or other terms indicating a right or privilege to take further legal proceedings on the subject, do not accompany the decree, it is presumed to be rendered on its merits.'

"To the same effect see Bigelow *vs.* Winsor, 1 Gray, 299, 301, where it is said: 'Sometimes, indeed, a party plaintiff in equity, who, because he is not prepared with his proofs, or for other reasons, desires not to go into a hearing, but rather to have his bill dismissed, in the nature of a discontinuance or nonsuit in an action at law, may be allowed to do so; but we believe the uniform practice in such case is to enter "dismissed without prejudice."'

"Likewise Cooper, Eq. Pl. 270, as follows: 'A plea in bar, stating a dismissal of a former bill, is conclusive against a new bill, if the dismissal was upon hearing, and if that dismissal be not, in direct terms 'without prejudice.' See, also, Story's Eq. Pl. 793, and authorities there cited.

"The authorities to sustain this view of the case might be multiplied, but those cited are sufficient and demonstrate the uniformity of the rule."

In Am. & Eng. Encyc. Law, Vol. 21, page 273, note 1, it is stated:

"The dismissal of a bill in chancery stands nearly on the same footing as a judgment at law, and will be presumed to be a final and conclusive adjudication on the merits, whether they were or were not heard and determined, unless the contrary is apparent on the face of the pleadings or in the decree of the court. 2 Smith's Lead. Cas. 667; Moss *vs.* Ashbrooks, 12 Ark. 369; Scully *vs.* Chicago, etc. RR. Co., 46 Iowa, 528; Blackinton *vs.* Blackinton, 113 Mass.

231; Lewis *vs.* Lewis, 106 Mass. 309; Durant *vs.* Essex Co., 7 Wall. 107; Knowlton *vs.* Hanbury, 117 Ill. 471; Case *vs.* Beauregard, 101 U. S. 688; Taylor *vs.* Yarborough, 13 Gratt. 183; Strang *vs.* Moog, 72 Ala. 460."

In Tankersley *vs.* Pettis, 71 Ala. 179, the court said:

> "The decree of the court of chancery, dismissing a bill absolutely and unconditionally on a hearing or pleadings and evidence, is an adjudication of the merits of the controversy, forming a bar to any further litigation of the same matters between the parties or their privies. A decree of that kind, not made because of insufficient pleading, or for want of jurisdiction, or for some cause not touching the merits, if not intended to be final and conclusive, is accompanied with words of qualification, with some appropriate terms, indicating that it is not intended to preclude further suit, such as that the dismissal is without prejudice. . . . When, however, the decree of the dismissal is unqualified, it is presumed to be an adjudication on the merits adversely to the complainant, and constitutes a bar to further 'litigation of the same matters between the parties.' Adams *vs.* Cameron, 40 Mich. 506; Thompson *vs.* Clay, 3 T. B. Mon. (Ky.), 359; Pelton *vs.* Mott, 11 Vt. 148; Stickney *vs.* Goudy, 132 Ill. 213; Kelsey *vs.* Murphy, 26 Pa. St. 78; Foote *vs.* Gibbs, 1 Gray (Mass.), 412; Thurston *vs.* Thurston, 99 Mass. 39; Lyon *vs.* Perrin, etc., Mfg. Co., 125 U. S. 698; Hicks *vs.* Aylesworth, 13 R. I. 562; Grove *vs.* Lyford, 44 N. H. 525; Foster *vs.* The Richard Busteed, 100 Mass. 412."

In Foote *vs.* Gibbs, 1 Gray, 413, in which the complainant's bill was dismissed on motion, dismissal not being in express terms "without prejudice," Chief Justice Shaw held:

> "The only question in this case is upon the effect of the former decree. It is a fundamental rule in the administration of justice that a question once litigated and determined between the parties, in a court of competent jurisdiction, is to be considered

as at rest. But if a court does not take jurisdiction of a suit in equity, but dismisses the bill, because the plaintiff has an adequate remedy at law, or for want of prosecution, or otherwise, for some cause not embracing an adjudication on the merits, such dismissal is not a bar. There is nothing to indicate the grounds of dismissal in this case, except the fact of dismissal, after an appearance for the defendant. But the authorities, both in England and in this country, are decisive that a general entry of bill dismissed with no words of qualification, such as 'dismissed without prejudice,' or 'without prejudice to an action at law,' or the like, *is conclusively presumed* to be upon the merits, and is a final determination of the controversy."

In Bigelow *vs.* Winsor, 1 Gray, 301, the court held:

"Sometimes, indeed, a party plaintiff in equity, who, because he is not prepared with his proofs, or for other reasons, desires not to go into a hearing, but rather to have his bill dismissed in the nature of a discontinuance or non-suit in an action at law, may be allowed to do so; but we believe the uniform practice in such a case is to enter 'dismissed without prejudice.' So, when a decree against the plaintiff in equity proceeds on the ground that he has adequate remedy at law, the course is to dismiss it without prejudice to an action at law.

. . . . . .

"A plea in bar, stating a dismissal of a former bill, is conclusive against a new bill, if the dismissal was upon hearing and if that dismissal be not, in direct terms 'without prejudice.' Coop. Eq. Pl. 270."

"In determining what has been adjudged, the courts will regard the decree, and in case of ambiguity, but not otherwise, will be governed by an accompanying opinion; where it is free from ambiguity, it speaks for itself and can not be qualified by an opinion by which it may have been preceded.

"A general dismissal of a bill may be pleaded in bar to a subsequent bill for relief on the same subject matter. For the reason that a dismissal of a bill in chancery stands nearly on the same footing as a

judgment for the defendant in any action at law, the presumption is that it was a final and conclusive adjudication upon the merits, whether they were or were not determined, unless from the decree of the court appears that they were not determined, or that fact is apparent on the face of the record."

Herman on Estoppel and Res Adjudicata, Vol. 1, p. 471.

"But a decree dismissing a bill in any United States court is absolute, and constitutes a bar to any further litigation between the same parties upon the same subject matter, unless made because of some defect in the pleadings or for want of jurisdiction, or because the complainant has an adequate remedy at law, or upon any other grounds which do not go to the merits, is a final determination. But where words of qualification are used, such as 'without prejudice,' or other terms indicative of a right or privilege to take further legal proceedings on the subject, do not accompany a decree, the presumption is that it was dismissed on its merits. This presumption is based upon the fact that where there are no words of qualification, as 'without prejudice,' the dismissal has been adjudged upon proper exceptions or other regular proceedings which brought into review the merits of the bill dismissed."

Herman on Estoppel and Res Adjudicata, 473, 474.

In New Orleans M. Co. *vs.* City of New Orleans, 14 Fed. Rep. 373, where the defense of *res adjudicata* was interposed, based upon a general decree of dismissal, which was sought to be explained by the opinion of the court, it was held:

"There is no doubt that if a decree is free from ambiguity, it speaks for itself and can not be qualified by the opinion by which it may have been preceded. 101 U. S. 551; 24 How. 333; 7 How. 199."

If, therefore, the decree in the equity case is conclusively

presumed to be upon the merits, the equity case possessed all of the elements necessary to render *adjudicata* the several items of set-off filed in this suit, being the "identical items set up, referred to and claimed in said equity cause."

Appellant's Claim.

Much of the argument of the appellant proceeds on the theory that as some of the fees claimed in the off-set or counterclaim were received by Baker within three years of the time of filing such set-off or counterclaim, therefore, the assignment having been without consideration, he is entitled to recover the aggregate amount of such items. But this argument overlooks the fact that *so long as the assignment stands as a valid and subsisting instrument, the money which Cummings claims to belong to him, in fact, belongs to Baker.* Cummings can not go back of the assignment or set it aside because his right to do so, for any reason whatever, is finaly concluded by the decree of the Supreme Court. To adopt any other view would be to hold that the equity suit war a farce; that it concluded no one; that it decided nothing and that Cummings had the right to use the court to litigate his claims and when determined adversely to him, to repudiate the decree. Can Cummings in the law suit then say the assignment was without consideration and void, or that it was obtained by fraud? In the suit filed by Cummings, the Supreme Court certainly decided that Cummings could not set the assignment aside *for any reason*, because he instituted his suit too late. It will be noted that the set-off or counterclaim was filed *more than two years after the equity suit.* In its opinion the court stated that Cummings might at his election have pursued a remedy for the alleged fraud in a court of law, and that it is clear that such an action predicated upon the facts set up in the bill in the equity case would have been barred in three years from the discovery of the fraud. The court further said: "It hence follows irrespective of the doctrine of *laches* that the relief which the bill seeks to obtain ought not to be

allowed by a court of equity." It is apparent, therefore, that the court expressly decided that Cummings was barred at law from setting aside the assignment, even though his suit for that purpose had been instituted at the same time the equity suit was instituted. But, as we have shown, his set-off or cross-action was in fact instituted more than two years *after* the equity suit. On what theory, then, can the appellant claim the right to set up any of these items of set-off in the law suit, the same being "the identical items set up, referred to and claimed in said equity cause?" As Judge Cole says in his opinion:

> "Another view of that adjudication is equally conclusive against the defendant. The Supreme Court held the equity suit to be barred on the ground that a suit at law brought at the time the equity suit was filed would have been barred. The earliest pleading of the defendant in this suit, which could by any possibility be construed to assail the sale or assignment for fraud and want of consideration was filed two years later than the bill in equity. The record, therefore, is an express adjudication that he is barred from questioning the validity of the sale and assignment at law in this suit as well as in the equity case."

Moreover, the same contentions, now made in this court, were made by the appellant in the Supreme Court of the United States, and that court not only considered them, but distinctly decided them. The court, in its opinion, after considering the principles which control the decision of the case, said:

> "These broad considerations of equity and justice were not applied below because it was deemed that the occasion for their enforcement had not arisen, for two reasons: First, because it was thought that even if Cummings discovered the fraud in ample time to have availed himself of his rights, he was lulled into not doing so by his faith and confidence in Baker and his disinclination to believe that Baker had perpetrated so gross a fraud upon him. Second, because it was said as Cummings' share of the earned fees, upon the theory of a half and half division, was

equal to the price which he received, *there was no consideration for the sale*, and the transaction was *wholly void*, hence there was no room for the application either of the Statute of Limitations or the doctrine of *laches*. In other words, that the partnership continued as to the inspector claims just as if no sale had been made. And the doctrine was carried to its logical outcome, since the judgment below awarded to Cummings a share in the fees earned by Baker, from contracts not under the control of the firm at the time of the sale of the interest in the inspector cases, but which were acquired by Baker thereafter.

"But *neither of these views meets our approbation*. The first is *completely answered* by the fact that the analysis of the evidence which we have made conclusively establishes that if the fraud was perpetrated as alleged, the fullest knowledge was conveyed to Cummings more than three years before he brought his suit. . . .

"The *second proposition*, conceding *arguendo* the facts are as it assumed them to be—that is, that the price was paid *Cummings from his own money*—leads in reason to an equally *impossible result*, since its consequence is substantially to affirm that neither limitation or *laches* can be applied in equity when, from a given view of the proof, it is considered that a fraud has been committed of such a nature as to avoid a contract. That this is the logical outcome of the proposition is shown by its application to the case under consideration. . . .

"To say, then, that Cummings was paid by his own money necessitates deciding that the fraud was established as alleged by Cummings. . . .

"Because we rest our conclusions upon the application of the bar of the statute and the *laches* of Cummings, *we must not be considered as intimating that we conclude that there was either clear and convincing proof, or even a preponderance of proof, that the sale was as claimed by Cummings.*"

These extracts from the opinion of the court constitute a complete answer to the contentions of the appellant's attorney in this case.

Appellant's counsel in his brief says in the equity suit he was entitled to recover "more" than at law. And again (p. 16, Brief):

> "It is true we asked that court on the ground that as it had (as we believed) jurisdiction of a part of the matter, to settle the *entire* controversy in its court."

It seems to us that statement ought to end this controversy. The appellant not only asked the court to take jurisdiction and grant him a decree against the appellee for each and every item embraced in the set-off, but also that the assignment should be canceled, and actually obtained a decree to that effect. He admits he claimed these items in the equity suit. He admits he offered evidence in reference to the same. He admits he had an accounting in reference to the identical items, and that at one stage in the case he had a decree against the appellee for them. He failed in the equity suit to recover the self-same items claimed in the set-off because the assignment continued in force, and he brought his suit too late to vacate it. How, then, can he in this suit, brought two years later, recover any of the items when he is prevented from questioning the validity of the assignment?

In 1897 the Court of Appeals of Maryland decided an interesting case where a similar effort was made to avoid the effect in a law suit of a decree in an equity suit theretofore pending between the same parties.

It is the case of Martin *vs.* Evans, 85 Md. 8, decided in 1897. That was a suit brought by Martin against Evans in trover to recover the value of certain bonds alleged to have been converted. To the declaration three pleas were filed, the second being *res adjudicata.* That plea set forth the proceedings in an equity case at one time pending between the same parties and averred that the relief sought in that case was the recovery of the value of the identical bonds for the alleged conversion of which this action was subsequently instituted. With the plea there was filed a

copy of the bill in equity and of the court's opinion and the final order dismissing the bill. To this plea the plaintiff demurred. The demurrer was sustained and an appeal was prosecuted to the Court of Appeals. McSherry, C. J., in delivering the opinion, said:

> "Now, it is not denied and it could not well be disputed at this day that if a question has once been tried and determined, without fraud or collusion, but on its merits by a court having jurisdiction of the parties to the controversy and of the subject matter involved therein, it can not again be litigated between the same parties, in the same or any other tribunal, so long as the adjudication remains unreversed and in full and operative effect.
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> . . . . . .
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> "Recognizing this, the appellant seeks to avoid its application by insisting that the bill in equity was dismissed for the want of jurisdiction, and that the relief sought under it was denied, not because it was determined the plaintiff had no title to the bonds, but because it was decided there was an adequate remedy at law, and, therefore, the equity court was without jurisdiction to pass any decree adjudicating the title to the bonds at all.
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> . . . . . .
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> "In the opinion the learned judge went fully into a discussion of the evidence adduced before him on the issue of the ownership of the bonds, which, it appears, were claimed to have been an *inter vivos* gift made by Reed to the plaintiff; and after a careful and critical analysis and review of all the evidence, he explicitly decided that the bonds were not the property of the plaintiff, but that they belonged to Reed. Having reached that conclusion on the merits, the judge incidently, it would seem, observed later on in the same opinion: 'I have thus, at the request of the solicitors in the case, gone into the merits and would dismiss the bill without regard to technical objections. But it seems to be perfectly clear that this proceeding could not be sustained at any rate, as at best it would be simply a conversion

of the plaintiff's property by Reed, for which she had an ample remedy at law. If the bonds were hers, she could have recovered in the suit she had on the law side of this court, or she could have instituted an action of trover.'

"These few sentences are now seized by the plaintiff and are relied on by her to show that the equity court dismissed the bill for the want of jurisdiction to entertain it; and the inquiry comes to this: Do these extracts from the opinion demonstrate, or can they be resorted to for the purpose of showing, that the bill in equity was dismissed—not because there was no decision on the merits, but because the court was without authority to pass upon the merits at all? The merits certainly were considered, discussed and decided. The opinion, if it can be consulted to measure the scope of the final order, leaves no room to doubt this. If the merits had in reality nothing to do with the ultimate conclusion reached in the equity case, it is difficult to understand why they were considered or decided at all. And if, in fact, the bill was dismissed solely for the want of jurisdiction in the court to grant the relief asked, and not because the evidence did not justify the granting of the relief, there would have been no occasion to advert to the merits."

. . . . . .

"The decretal order itself does not show upon what ground the bill was dismissed.

. . . . . .

"Even if the opinion may be looked to for the purpose of ascertaining whether the equity court considered that there was an adequate remedy at law, still there are no qualifying words in the decretal order warranting the inference that the merits were not finally adjudicated, or indicating that the dismissal was founded on purely technical grounds. Whenever a decree dismissing a bill in equity fails to restrict its own scope, the presumption, according to the great preponderance of decided cases, is, that the issues raised by the proceedings have been disposed of on their merits and they therefore become

res judicata. When the decree of dismissal is unqualified, it is presumed to be an adjudication on the merits adversely to the complainant, and constitutes a bar to further litigation of the same matters between the parties. Tankersley *vs.* Pettis, 71 Ala. 179; Story's Eq. Pl., 793; Adams *vs.* Cameron, 40 Mich. 506; Thompson *vs.* Clay, 3 T. B. Monr. 359; Pelton *vs.* Mott, 11 Vt. 148; Stickney *vs.* Goudy, 132 Ill. 213; Kelsey *vs.* Murphy, 26 Pa. St. 78; Foote *vs.* Gibbs, 1 Gray, 412; Thurston *vs.* Thurston, 99 Mass. 39; 6 Encyc. Pl. & Pr. 993, and the large number of cases there collected.

"In Foote *vs.* Gibbs, *supra*, it was said: 'There is nothing to indicate the grounds of dismissal in this case, except the fact of dismissal after an appearance for the defendants. But the authorities, both in England and in this country, are decisive that a general entry of "bill dismissed" with no words of qualification such as "dismissed without prejudice," or "without prejudice to an action at law," or the like, is conclusively presumed to be upon the merits and is a final determination of the controversy.' And so in Durant *vs.* The Essex Co., 7 Wall. 107, the Supreme Court, in speaking of a decree dismissing a former bill between the same parties, said: 'The decree dismissing the bill in the former suit in the Circuit Court of the United States being absolute in its terms, was an adjudication of the merits of the controversy and constitutes a bar to any further litigation of the same subject between the same parties. A decree of that kind, unless made because of some defect in the pleadings, or for want of jurisdiction or because the complainant has an adequate remedy at law, or upon some other ground which does not go to the merits, is a final determination. Where words of qualification, such as "without prejudice" or other terms indicating a right or privilege to take further legal proceedings on the subject do not accompany the decree, it is presumed to be rendered on the merits.' And Walden *vs.* Bodley, 14 Pet. 156; Hughes *vs.* United States, 4 Wall. 237; Bigelow *vs.* Winsor, 1 Gray, 301, and Foote *vs.* Gibbs, 1

Gray, 412, were cited. The case of Durant *vs.* The Essex Co., *supra*, was followed and relied on in Lyon *vs.* Perrin, etc., Mfg. Co., 125 U. S. 698.

"The broad terms of the decretal order dismissing the bill can not be limited, qualified or restricted by the opinion filed in the equity case. The opinion of the judge is the expression of the reasons by which he reaches his conclusions; these may be consistent or contradictory, clear or confused.

"The judgment or decree is the fiat or sentence of the law, determining the matter in controversy in concise, technical terms, which must be interpreted in their own proper sense. It would, we think, be of dangerous tendency to make the force and effect of the most solemn official acts depend upon the various interpretations which ingenuity might suggest to the most carefully considered language introducing them. State, use of Bruner et al., *vs.* Ramsburg et al., 43 Md. 333. Or, as succinctly expressed in Durant *vs.* The Essex Co., *supra*, the reason for the signing of a decree 'is no part of the judgment itself.' The decree, and not the opinion, is the instrument through which the court acts. Wood, etc., *vs.* Fuller, 61 Md. 460.

"Agreeing, as we do, with the circuit court that the controversy involved in this case was fully and finally determined by the decree in the equity case between the same parties, we affirm its judgment with costs."

In view of the foregoing, we respectfully submit, in the language of the stipulation—

> "that the defendant [appellant] herein may not set up in bar of the plaintiff's action any of said items of set-off and counterclaim as pleaded in this action, but is concluded by the proceedings and decree in said equity cause,"—

and that, therefore, the judgment of the court below was right, and should be affirmed.

CLARENCE A. BRANDENBURG,
Attorney for Appellee.

APPENDIX.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

HENRY M. BAKER
vs.
HORACE S. CUMMINGS. } No. 30197. Law.

WASHINGTON, D. C., November 18, 1898.

Mr. Justice COLE said:

In the case of Baker *vs.* Cummings, an action at law, the declaration seems to have been filed on the 19th day of December, 1889. The defendant Cummings, without pleading to the action at law, filed a bill in equity in the early part of February, 1890, for an injunction to restrain the prosecution of this action and to have the account settled between him and Baker, who is the plaintiff in the action at law. The grounds of equitable jurisdiction alleged were that they had been jointly interested in the prosecution of certain claims against the Government of the United States, and that fees had accumulated in which they were jointly interested and that on a certain day the plaintiff in the equity suit, Cummings, had agreed to and did assign to Baker all his interest in those fees for the sum of $15,000; and the allegation of the bill was that he, Cummings, was induced to enter into that contract by false representations made to him by Cummings, and that the sum paid, $15,000, was not more than, if even as much as he was entitled to out of the fees anyway, so that the sale was without consideration and that the amount of the fees to which he was entitled was largely in excess of $15,000, even as much as $40,000; and he prayed that the sale and assignment should be declared void, as obtained by fraudulent representations, and that the account should be settled, and Baker decreed to pay what should be found to be due on such settlement. The case proceeded through this court and Cummings obtained a

decree. The court found that the sale and assignment were fraudulent and void and set them aside, and settled the account and found a large balance in favor of Cummings. After giving him credit for the amount Baker sued for in the action at law, there was a large balance left due Cummings from Baker which was decreed to be paid him by this court; and that decree was affirmed by the Court of Appeals, but the Supreme Court of the United States reversed both decrees and directed the dismissal of the bill, which was done in this court in April or May last. The decree was a formal decree dismissing the bill by direction of the mandate of the Court of Appeals.

Now, after the filing of that bill in equity by Cummings against Baker, on February 10, 1892, two years after he had brought his bill in equity, Cummings pleaded his share of these fees he claimed as a set-off in the law suit. Of course Baker could take no action upon that plea at that time for he was enjoined from doing anything in the law cause by an injunction of the court. The matter was in controversy in the equity case and he was enjoined from proceeding in the law case and it stood that way until after the bill was dismissed in this court pursuant to the mandate of the Court of Appeals.

After the entry of the decree in this court, the plaintiff in the law case, Baker, pleaded by way of replication to the defendant's pleas of set-offs, in bar of said pleas, the adjudication in the equity suit. From this point the pleadings have been rather circuitous, culminating in a demurrer of the plaintiff to the rebutters of the defendant. There were two rebutters. They alleged that the decision of the equity case turned upon the point of the Statute of Limitations or *laches*, and that the allegation of fraud and want of consideration alleged in the pleadings in this case as grounds for avoiding the sale and assignment, were not adjudicated in that case, and he refers to the opinion of the Supreme Court of the United States in support of the allegation.

The ground of the plaintiff's demurrer is that the Record is as much a bar as if those questions had been expressly adjudicated. The rule upon this point is that where a case has been adjudicated upon its merits, it is a bar to further liitgation between the same parties on all questions raised by the pleadings, whether they were actually decided or not. The questions of whether the sale and assignment were procured by fraud and were without consideration, were raised by the pleadings in the equity cause. The defendant's counsel admits that the question of fraud, but he denies that the question of "no consideration," was raised by the pleadings in the equity case. The Supreme Court in its opinion, however, considered that the question of "no consideration" was before that court. Counsel for the defendant replies that that part of the opinion is *obiter*. But this court must assume the construction by the Supreme Court of the pleadings in that cause, by which it ascertained and declared that the question of "no consideration" was at issue, is correct. So that the defendant is concluded by the record referred to upon both those points if the decree dismissing the bill is a decree upon the merits.

A decree dismissing the bill is *prima facie* construed to be a decree upon the merits unless there is something in the decree itself to indicate to the contrary, and nothing of the sort is found in the decree in this case. Probably, the opinion of the court, where there is one, may be examined for the purpose of ascertaining whether the decree was on the merits where it is not expressly shown on the face of the decree itself, as is true in this case. Looking then to the opinion of the court, it appears that the decree was based upon the finding by the court that the defendant had a remedy at law for the matters stated in the bill and that the Statute of Limitations would have barred an action at law and therefore that the period of the statute should by analogy be considered *laches* in equity. The Statute of Limitations was expressly pleaded by Baker in the equity cause

and that plea has always been held by the Supreme Court to be a plea to the merits and therefore a decree sustaining that plea is a decree on the merits.

Another view of that adjudication is equally conclusive against the defendant. The Supreme Court held the equity suit to be barred on the ground that a suit at law brought at the time the equity suit was filed would have been barred. The earliest pleading of the defendant in this suit, which could by any possibility be construed to assail the sale or assignment for fraud and want of consideration, was filed two years later than the bill in equity. The Record therefore is an express adjudication that he is barred from questioning the validity of the sale and assignment at law in this suit as well as in the equity case and it follows that the demurrer to the rebutter must be sustained.

The foregoing is a correct stenographic report of the verbal statements of the court in sustaining the plaintiff's demurrer to the defendant's rebutters.

CHAS. C. COLE.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

HENRY M. BAKER *vs.* HORACE S. CUMMINGS. } No. 30197, Law.

The opinion of Chief Justice BINGHAM *delivered on Monday, March 27, 1899:*

This case was submitted to the court to determine what the judgment of the court should be under certain contingencies. The stipulation filed in the case is as follows:

"It is hereby stipulated and agreed by and between the parties to this cause, by their respective attorneys, that this cause may be tried by the court without a jury, the parties

hereby expressly waiving the same, upon the following agreed statement of facts, subject to the limitations herein contained:

"That on the 31st day of July, A. D. 1889, and for a long time prior thereto, the plaintiff and the defendant were co-partners engaged as attorneys in the prosecution of claims against the United States, the net fees derived therefrom being under the contract of partnership equally to be divided between them, the said partners; that on the 19th day of December, 1889, the plaintiff instituted this action to recover the sum of $2,712.81, with interest from the 31st day of July, A. D. 1889; that the said sum is the identical sum referred to on pages 227 and 248 of the Record on appeal to the Supreme Court of the United States in the equity cause hereinafter referred to; that after the institution of this suit the defendant herein instituted a certain equity proceeding against the plaintiff herein in the Supreme Court of the District of Columbia, the same being known and numbered on the dockets of said court as equity cause No. 12,263; the record, decrees, and opinions of the respective courts therein, both in this and the appellate courts, are hereby referred to and made part hereof; that the several items of account set forth in the pleas of set-off herein are respectively the identical items set up, referred to, and claimed in said equity cause.

"If the court on inspection of said record and proceedings in said equity cause and of the record and proceeding of this cause shall be of opinion that the defendant herein may not set up in bar of the plaintiff's action any of said items of set-off and counter claim as pleaded in this action, but is concluded by the proceedings and decree in said equity cause, then this court may enter judgment for the plaintiff in this action for the sum of $2,712.81, with interest thereon from the 31st day of July, A. D. 1889, as claimed in his declaration, herein, but if the court shall be of opinion that any of said items of set-off and counterclaim may be set up in bar of the plaintiff's action herein, then this cause shall

be remanded to the docket for trial by jury. Both parties hereto reserve the right of appeal or by writ of error from the judgment of this court or of any court of review passing hereon and also any other remedy which they may by law be entitled to."

From this stipulation, it is manifest, the decision of this case involves substantially the question whether the decree of the Supreme Court reversing the decrees of the Court of Appeals of this District and the Supreme Court of the District is a substantial adjudication of the matters set forth in the pleas of set-off filed by the defendant in this case. It is agreed that the items in the pleas of set-off in this case are precisely the same as the matters of account set forth in the bill in equity and that the court had all of these matters before it at the time of these respective adjudications. Testimony was taken, the case was referred to the auditor, testimony was taken before him by each of the parties *in extenso* and a report was made by the auditor which was confirmed by the Supreme Court of the District of Columbia, which rendered a decree in favor of the complainant in the equity suit. From that decree an appeal was prosecuted to the Court of Appeals and there was an affirmance by that court of the decree of the Supreme Court of the District of Columbia. An appeal was taken to the Supreme Court of the United States which resulted in the reversal of the decision of the courts below and of the entry of a decree dismissing the bill generally, without any words of limitation. It is shown by the Record that the matters that are now involved in the plea of set-off were involved in that case, that they were discussed and commented upon by the court in its opinion and necessarily decided by the court. It is a general rule of law that not only are all things which are directly pertinent to the litigation, and which are expressly litigated, adjudicated, but also all things which might have been litigated under the issues—that they are to be construed as disposed of by the decree. In this case it seems to me not only might the matters of account between

the parties have been litigated but that they were litigated and that all the matters of set-off on the part of the defendant in this case were expressly in issue and expressly litigated in the equity case. The decree of the Supreme Court reversing the court below, which had been in favor of Cummings, puts an end to the litigation.

This same matter has been once directly involved by a demurrer which was filed to the pleas. That demurrer was heard by Mr. Justice Cole and a decision rendered by him sustaining the demurrer. In sustaining that demurrer, as appears by the record, he decided the very question that is now before me in a different form. It is a rule from which we never depart, except for some very ample reason, that where a matter in a case has been once determined, whether of law or fact, by one justice of this court, that another justice of this court will not attempt to consider or reverse the former decision while that decision remains unreversed. From a reading of the opinion of Justice Cole, it is manifest he considered the same question. That alone would prevent me from finding for the defendant upon this stipulation; but beyond that, I have examined the Record sufficient to satisfy myself that the decision of Justice Cole is entirely correct and one that I would have made if I had been in his place. There is no opportunity for criticising or reversing that decision.

The stipulation here is that if a court on inspection of the record and proceedings in the equity case and of the record and proceedings in this case, shall be of opinion that the defendant may not set up in bar of the plaintiff's action any of the items of set-off and counterclaim as pleaded in this action, judgment may be rendered for the plaintiff with interest. As I am of the opinion that the defendant may not set up in bar of the plaintiff's action any of the items of set-off, judgment will be rendered for the plaintiff for the amount claimed.

In the Supreme Court of the United States

October Term, 1939

Henry M. Boker,
Petitioner,
v.
Horace S. Chapman,
Respondent.

No. 207.

BRIEF FOR PETITIONER

CLARENCE A. BRANDENBURG,
Counsel for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1900.

HENRY M. BAKER,
Petitioner,
vs.
HORACE S. CUMMINGS,
Respondent.

No. 207.

STATEMENT OF FACTS.

In the year 1874, Horace S. Cummings and the petitioner, Henry M. Baker, formed a partnership under the firm name of Cummings & Baker, for the conduct of business as attorneys in the prosecution of claims against the Government. The agreement of partnership was verbal and was dissolvable at the pleasure of either party. The partners were to share equally in the profits and losses of the business. They remained in partnership until September, 1889, when the firm was dissolved. In July, 1889, shortly before the dissolution of the partnership, an account was stated between the petitioner and the respondent, which showed a balance due from Cummings to Baker, amounting to $2,712.81. In December, 1889, after the dissolution of the partnership, Baker brought this suit at law against Cummings to recover said sum of $2,712.81 due him upon the account stated between them. On February 1, 1890, *before* plea was due in the law suit mentioned, Cummings, the defendant in the law suit, filed a bill in equity in the

Supreme Court of the District of Columbia against Baker, the same being found on page 27 of the Record.

The bill alleged that about the 1st of January, 1876, Cummings and Baker entered into a partnership by parol to prosecute claims against the Government of the United States, and that it continued until September, 1889, when it was dissolved, and that among the items of business of the firm were cases known as "inspector cases," of which the firm had a great many. The bill further alleged that on September 6, 1886, Cummings assigned to Baker in writing all his interest in the fees of such so-called "inspector cases," including those in which the fees had not been divided, excepting two cases only, whether paid or unpaid, filed or outstanding. The bill further alleged that this assignment was procured by fraudulent representations made by Baker. It further alleged that this present law suit had been instituted in the Supreme Court of the District of Columbia; that all of the items mentioned in the bill of particulars annexed to the declaration therein, originated in and grew out of the partnership dealings of the parties, and that they did not constitute a full adjustment of the receipts of said Cummings and of said Baker, and that only by a full, proper and complete accounting and discovery under the order and direction of a court of equity could a proper adjustment be had of the rights and equities of the complainant and defendant growing out of their partnership dealings. The bill further alleged that this suit at law was not yet at issue, but that the time for pleading had nearly approached and that the complainant Cummings, could not, under the rules of pleading at law, incorporate in his plea the equitable defenses set forth in the bill and which in a court of equity would prevail against Baker's demand, and especially that the plaintiff's equitable right to have discovery and to have the assignment referred to canceled, was not cognizable by a court of law; and that if the plaintiff in the law suit, Baker, was permitted to prosecute said suit

against Cummings, he, Cummings, would be deprived of his defenses, and that therefore he was entitled to have Baker enjoined from the prosecution of said suit at law. The bill therefore prayed for discovery, that the assignment referred to might be declared null and void, and that Baker should be enjoined from the further prosecution of this suit at law, and that a complete accounting might be had in the equity court between Baker and Cummings in respect of the partnership dealings, and Baker be decreed to pay Cummings the amount found to be due him.

Because of the filing of said equity suit all proceedings in the present law suit were suspended. In the progress of the litigation in the equity suit, the court below held that Baker was indebted to Cummings in a sum between thirty and forty thousand dollars, after allowing Baker a credit for the sum of $2,712.81, the identical sum claimed in this law suit. From the decree of the Supreme Court of the District of Columbia an appeal was prosecuted to the Court of Appeals of the District of Columbia, which affirmed the decree of the court below. 8 App. D. C. 515. From this decree of that court affirming the decree of the Supreme Court of the District of Columbia, an appeal was prosecuted to this court, and this court on February 21, 1898 (169 U. S. 209), reversed the decree of the Court of Appeals and remanded the case, with instructions to set aside the decree of the Supreme Court of the District of Columbia and to remand the same to that court with instructions to dismiss the bill. Thereafter, the Court of Appeals did remand the case to the Supreme Court of the District of Columbia with the instructions stated, and that court thereafter, on the 18th day of April, 1898, passed its final decree, in general term and without qualification, pursuant to the mandate of this court, dismissing the bill of Cummings.

On the 10th day of February, 1892, *pending* the disposition of the *equity case referred to, and more than two years after its institution*, Cummings filed pleas to this law suit

(page 4 of the Record), the only ones thereof which it is necessary to consider being the 4th and 5th, in which the defendant Cummings sought to offset the amount of the plaintiff's claim by an alleged indebtedness of $35,873.35. Nothing further was done in the law case until June 16, 1898, after the dismissal of the equity case referred to by the Supreme Court of the District of Columbia pursuant to the mandate of this court, when Baker filed the replications found on page 15 of the Record. To the pleas of set-off, with leave of court, Baker pleaded, first, limitations, secondly, that in consideration of $15,000 Cummings had on the 6th day of September, 1886, assigned to him all his interest in the "inspector cases" and that the amount claimed in the set-off filed by Cummings was part of the fees received by Baker in the prosecution of the "inspector cases" covered by the assignment of Cummings; and fourth, that after the execution of the assignment, Cummings instituted the equity suit referred to in which by decree passed therein, he recovered from Baker the sum of $32,772.14 for the identical items claimed in the defendant's plea of set-off, and that said decree was thereafter reversed and the complainant's bill dismissed generally, pursuant to the mandate of this court, and that therefore the claim of the defendant to set off such items was *res adjudicata*. To these pleas Cummings replied, first, denying that there was any consideration for the assignment, and second, that the assignment was obtained by fraudulent concealment and misrepresentation. The defendant rejoined that the matters therein referred to were *adjudicata* by reason of the decree of the court in the equity case referred to. To these pleas of *res adjudicata* Cummings responded (p. 20 of the Record), that this court in its *opinion* expressly refused to decide whether the assignment was without consideration and void, and whether the assignment was obtained by fraudulent concealment and misrepresentation. To these pleas Baker demurred. The demurrer was sustained, Justice Cole rendering the opinion found in the appendix to

this brief. Thereafter issue was joined in due course. After issue was joined, the stipulation (p. 23 of the Record) was entered into between the parties to the suit, wherein it is agreed that the sum claimed in the law suit, now before this court, is the identical sum referred to on pages 227 and 248 of the Record on appeal to the Supreme Court of the United States in the equity case referred to. By reference to the Record on appeal to this court it will be noticed that on page 227 in the hearing before the auditor in the equity case, Mr. Mackay, on behalf of Mr. Cummings, admitted that Mr. Baker was entitled to recover from Cummings the sum claimed in the law suit, and on page 248 of said Record, Cummings himself, when testifying before the auditor, stated as follows:

> "Mr. Baker and I agreed in regard to those cases—in regard to the fees due to him and the fees due to me and in the final agreement, in regard to those fees—there was an amount due to him, of some $2,700 and that he claims credit for in his account, *which I admit.*"

The stipulation further recites that *after* the institution of this *law suit* Cummings instituted the *equity* proceedings referred to against Baker and that the several items of account set forth in the pleas of set-off filed in this law suit are respectively the *identical items set up, referred to and claimed in said equity cause.*

The stipulation further provided that if the court on inspection of the Record and proceedings in said equity cause and of the Record and proceedings in this cause, should be of opinion that Cummings may not set up in bar of Baker's action any of the items of set-off and counterclaim as claimed in this action, but is concluded by the proceedings and decree in the equity cause, then that the court might enter judgment for Baker against Cummings for the sum of $2,712.81, with interest from July 31, 1889, as claimed in the declaration, but if the court should be of opinion that

any of said items of set-off and counterclaim might be set up in bar of the plaintiff's action herein, then that this case should be remanded to the docket for trial by jury.

Upon this stipulation the cause came on for hearing before Mr. Chief Justice Bingham on March 27, 1899, who, being of the opinion that Cummings was concluded as to all of the items embraced in his plea of set-off by the decree in the equity cause, rendered judgment in favor of Baker against Cummings in accordance with the terms of the stipulation.

From that judgment Cummings prosecuted an appeal to the Court of Appeals of the District of Columbia and as required by the terms of the stipulation, made part of the Record, the Record on appeal in the equity case referred to.

That court, on October 19, 1899, reversed the judgment of the Supreme Court of the District of Columbia. The opinion was delivered by Mr. Justice Shepard (Rec., p. 319) and concurred in by Mr. Justice Morris. Mr. Chief Justice Alvey dissented, but delivered no dissenting opinion (Rec., p. 330). The result is, that two of the justices of the Supreme Court of the District of Columbia, Mr. Justice Cole (Appendix to this brief), and Mr. Chief Justice Bingham (Appendix hereto), and Mr. Chief Justice Alvey, of the Court of Appeals, three justices, concur in the opinion that judgment should pass for the petitioner Baker, while two justices, Mr. Justice Shepard and Mr. Justice Morris, who constitute a majority of the Court of Appeals, are of opinion that the defendant Cummings is not concluded by the decree of this court, but may litigate anew the same matters decided by this court February 21, 1898. (169 U. S. 189).

Thereafter, on February 10, 1900, a petition was filed in this court praying for a writ of certiorari, which petition was granted, and in that way the case now comes before this court.

The majority of the Court of Appeals in their opinion held that although the present suit is between the same parties and over the same subject-matter, as the equity suit, the decree in the equity suit is *adjudicata* only as to that (in the language of the court, page 326)—

> "which ought to have been decided—that is to say, what must have been decided as expressly at issue and that also which must either have been assumed, admitted expressly or by implication or proved, in order to warrant the judgment or decree rendered."

The court also said (p. 324):

> "The application of this general principle (*adjudicata*) to the peculiar features of the case shown by this record presents a question of grave difficulty, involving, as it does, also the delicate task of *defining the scope* of a *general decree* entered in *pursuance* of a *mandate* of the *Supreme Court of the United States.*"

The majority of the court then examined the opinion of this court, and coming to the conclusion that the decree of this court, though absolutely unqualified, was not upon the merits, and, therefore, not a bar to the claim of Cummings to recover in this suit the identical items set up and claimed in the equity suit, reversed the judgment below.

In the conclusion of the opinion the majority of the Court of Appeals say (Rec., p. 330):

> "If we have erred we have the satisfaction of knowing that the amount in controversy gives the appellee the right to a review of our decision."

ASSIGNMENT OF ERRORS.

The court below erred in finding and holding—

1. That the unqualified decree of this court directing the dismissal of the bill in equity, and its actual dismissal

pursuant thereto, is not a bar to the set-off interposed in the present suit.

2. That the decree of this court in the equity case was based upon the laches of Cummings, and that such a decree, though unqualified, is not a decision on the merits and a bar to the set-off of the defendant.

3. That the cancelation of the assignment from Cummings to Baker alone conferred jurisdiction in the equity suit, and that, therefore the decree in that case does not operate to bar Cummings from undertaking to set aside the assignment on the grounds of fraud and lack of consideration in the present suit.

4. In resorting to the opinion of this court for the purpose of qualifying the unqualified decree of this court in the equity case.

5. In not affirming the judgment of the Supreme Court of the District of Columbia in favor of the petitioner.

BRIEF.

The scope of the issues in this case has been very much narrowed by the stipulation (p. 23 of the Record). By that stipulation it is agreed that if—

> "the defendant (Cummings) herein may not set up in bar of the plaintiff's action any of said items of set-off and counterclaim as pleaded in this action, but is concluded by the proceedings and decree in said equity cause, then this court may enter judgment for the plaintiff (Baker) . . . but if the court shall be of opinion that any of said items of set-off or counterclaim may be set up in bar of the plaintiff's action herein, then this cause shall be remanded to the docket for trial by jury."

From this stipulation, therefore, it is apparent that if the several items of set-off and counterclaim as pleaded in this

action are *adjudicata* by reason of the decree of this court in the equity case (169 U. S. 189), the judgment of the court below should be reversed and the judgment of the Supreme Court of the District of Columbia affirmed.

It is important, therefore, to determine whether the Record, proceedings and decree in the said equity cause embrace all of the elements necessary to render *adjudicata* the items of set-off filed in this action.

In Lyon *vs.* The Perrin & Gaff Mfg. Co., 125 U. S. 698, the court said:

> "It is well settled that in order to render a matter *res adjudicata*, there must be a concurrence of four conditions, viz.: (1) Identity in the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; and (4) identity of the quality in the persons for or against whom the claim is made."

This court in Durant *vs.* The Essex Co., 7 Wall. 107, added to the elements essential to sustain a plea of *res adjudicata* enumerated in Lyon *vs.* The Perrin & Gaff Mfg. Co., *supra*, the requirement that the decree must be upon the merits. The court stated:

> "*The decree dismissing the bill in the former suit in the Circuit Court of the United States being absolute in its terms, was an adjudication of the merits of the controversy, and constitutes a bar to any further litigation of the same subject between the same parties. A decree of that kind, unless made because of some defect in the pleadings, or for want of jurisdiction, or because the complainant has an adequate remedy at law, or upon some other ground which does not go to the merits, is a final determination.*"

Whether the plea of *res adjudicata* in this case concludes the defendant as to his plea of set-off will therefore be determined by ascertaining if the elements essential to the maintenance of such plea, as determined by this court in the foregoing decisions, are found to be present.

The identity of the cause of action and of the thing sued for and the identity of the parties to the action, are all admitted by the stipulation, found on page 23 of the Record. By reference to that stipulation, it will be seen—

> "that the several items of account set forth in the pleas of set-off herein, are respectively the *identical* sums set up, referred to and claimed in said equity cause."

The stipulation also admits the identity of the parties and that in both proceedings Cummings sought to recover from Baker the amount of said several items. The fourth essential pointed out in Lyon *vs.* Perrin, "identity of the quality in the persons for or against whom the claim is made," sufficiently appears from the stipulation also.

If, therefore, the decree of this court was not made "because of some defect in the pleadings, or because the complainant has an adequate remedy at law, or upon some other ground which does not go to the merits," it is a final determination. Durant *vs.* Essex Co., *supra.*

It is perfectly clear that the decree in the equity case was not made "because of some defect in the pleadings." Nor was it made "for want of jurisdiction or because the complainant had an adequate remedy at law." It will be remembered that Cummings himself appealed to the court of equity and asserted its jurisdiction, as a basis for relief, in the following manner (Rec., p. 31):

> "And complainant avers that all of the items in the said bill of particulars originate in and grow out of the partnership dealings of the parties, and not otherwise, and that the said items do not constitute a full adjustment of the rights of this complainant and the said defendant, and that only by a full, proper, and complete accounting and discovery under the order and direction of a court of equity could a proper adjustment be had of the rights and equities of the complainant and defendant growing out of their partnership dealings. That the said suit at

law is not yet at issue, but that the time for pleading thereto has nearly approached, and that the complainant can not under the rules of pleading at law incorporate in his plea the equitable defenses herein set forth, and which in a court of equity would prevail against the defendant's demand, and especially is the equitable right of the complainant to have discovery in the premises and to have the said assignment canceled and held for naught, a matter not cognizable by a court of law, and if the defendant were, therefore, permitted to prosecute his said suit at law against complainant this complainant would be deprived of his defenses to said suit now pending as aforesaid, and that the complainant is therefore entitled to have the defendant enjoined from prosecuting his said suit at law and to have this court order and direct a full and complete accounting between complainant and defendant in respect of their partnership dealings as aforesaid."

In Case *vs.* Beauregard, 11 Otto, 688, as in this case, after availing himself of his equitable remedy on the distinct ground that he had no remedy at law, the defendant sought to avail himself of the same defense thereafter at law, and in considering this position, the court said:

"The bill in that case asserted, in the most ample terms, the remedilessness of the complainant at law. It averred that at and before the transfer and conveyances of the partnership property, sought to be charged, to the railroad company, each of the members of the partnership was largely indebted, without means, and in a state of insolvency, and that they had since been and still were insolvent; so that a suit at law and the recovery of a judgment against them, or either of them, would not afford the complainant any relief, because neither of the partners have or had, since the dates of the pretended transfers of said partnership property, any property whatever upon which the complainant could levy an execution at law, or seize for the satisfaction of the debt due to the bank. What more could have been

> necessary to show that the complainant had no remedy at law; that his remedy, if he had any, was in equity."

In view of these allegations, the court did take jurisdiction and the parties proceeded to their proofs. The jurisdiction of the equity court was not and can not now be questioned.

The majority of the Court of Appeals, in their opinion, say (page 324 Record):

> "Therein (in the bill in equity), as shown in the statement of the case, he alleged the procurement of the said assignment through fraudulent misrepresentations and concealment, and prayed its cancelation. This, being a relief that could not be had at law, presented the necessary foundation of the jurisdiction of the court of equity."

And again (page 326 Record):

> "Now, as we have seen, the gravamen of the bill of Cummings was the cancelation of the assignment held by Baker. This *alone conferred the jurisdiction* in equity."

In these statements, we respectfully submit, the court below erred. While it may be true that a court of equity only could order the *cancelation* of the assignment, the grounds alleged for its cancelation were as available in defense of the present law suit, and in support of the set-off, as in the equity suit; and, indeed, that is what Cummings now seeks to do, and which, by its judgment, the Court of Appeals says he may do. The court below is also in error in stating the request for the cancelation of the assignment "*alone* conferred the jurisdiction in equity." For, as shown, the bill expressly alleged (page 31 Record)—

> "And the complainant avers that all of the items in the said bill of particulars originate in and grow out of the partnership dealings of the parties, and

not otherwise, and that the said items do not constitute a full adjustment of the rights of this complainant and the said defendant, and that only by a full, proper and complete accounting and discovery under the *order and direction of a court of equity* could a proper adjustment be had of the *rights and equities* of the complainant and defendant *growing out of their partnership dealings.*"

And the bill in equity prayed an accounting. It is therefore obvious that the court of equity had jurisdiction also because the suit sought a settlement of partnership affairs, and an accounting, the last being a matter of which both the law and equity courts had cognizance. But after all, under the authorities, what matters it what was the ground of jurisdiction, so long as it appears the court did have jurisdiction? Because if the court did have jurisdiction, and the case was not dismissed on "some other ground which does not go to the merits," the decree in the equity case is necessarily a bar, the present suit being between the same parties and about the same subject-matter.

The Decree of the Supreme Court of the United States was Upon the Merits.

Was then the decree of this court "upon some other ground which does not go to the merits?"

The primary contention of the attorney for Cummings is, that in order to determine if the decree of this court was upon the merits, we may look to its opinion. We respectfully submit, on the other hand, that recourse may be had to the opinion of the court *only* when the record and decree leave the matter in doubt. The decree itself is the sentence of the law, and it can not be restricted or qualified by the opinion filed in the case. The record and decree in this case leave no doubt whatever upon the subject. The very object of the defendant in seeking to refer to the opinion is to *raise a doubt*, because it is obvious the doubt

which he claims to exist is found, if found at all, in the opinion itself and *not* in the record or decree.

The authorities seem to remove all question upon the subject.

In Campbell et al. *vs.* Rankin, 9 Otto, 261, considering a similar proposition as that here maintained, this court said:

> "The issue in both cases was, to which claim the disputed piece of mineral deposit belonged and *if that issue was not clear*, it was competent under the decisions we have cited, to show by parol proof that the controversy was over the same locality and that the issue had therefore been decided against Rankin."

The matter seems to have been specifically and definitely decided in Davis *vs.* Brown, 94 U. S. 423, where this court said:

> "When a judgment is offered in evidence in a subsequent action between the same parties upon a *different demand*, it operates as an estoppel only upon the matter actually at issue and determined in the original action; and such matter, *when not disclosed by the pleadings*, must be shown by extrinsic evidence."

Again, in Russell *vs.* Place, 94 U. S. 606, this court said:

> "If there be an *uncertainty* on this head of the record . . . the whole subject matter of the action will be at large and open to a new contention unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment and give effect to the adjudication actually made, *when the record leaves the matter in doubt*, such evidence is admissible."

The opinion is no part of the record.

England *vs.* Gebhart, 112 U. S. 502, 506.
Sargeant *vs.* State Bank, 12 How. 371.
Fisher *vs.* Cockerell, 5 Pet. 248, 254.

We therefore submit that recourse can not be had to the opinion of the court in this case inasmuch as the matter at issue in the equity case "is not left in doubt."

The Opinion of the Supreme Court.

Although the right to do so is denied, yet, for the sake of argument, assuming the right exists, an examination of the opinions of this court, of the Court of Appeals of the District of Columbia and of the Supreme Court of the District of Columbia plainly reveals that the merits of the controversy were in issue, were considered and decided in the equity suit.

Cummings filed his bill in equity for an accounting claiming that he had no adequate remedy at law, took a mass of testimony, had several references to the auditor and *actually obtained a decree against Baker for the identical items of set-off which he now seeks to recover in this action.* To permit him to again litigate the same matter in this court after a decree in the equity court would, it seems to us, be a travesty upon justice.

It is an undisputed maxim of the law that *nemo debet bis vexari pro una et eadem causa.* This doctrine seems to be particularly applicable to this suit as the said equity cause "vexed" the parties to it for more than eight years. The equity cause was based upon allegations by Cummings that Baker had defrauded him in various ways in the purchase of his rights in sundry cases and the fees resulting therefrom, said cases being technically known as "inspector cases," and secondly, that in paying him for them Baker had used funds to which Cummings was entitled and hence that the sale was void for want of consideration. To show that Cummings relied on the first of these contentions, reference can be made to the Record, pages 7, 29, 30, 31, 48, 58, 68, 80, 81, 83, 84, 116, 121, 243 and others, and to show that he relied on the second claim, namely, that Cummings was paid from his own money, pages 30, 47, 84, 237, 238, 246, 247 and others.

If a second suit or action is brought for the same cause as the first one, as this is, it naturally follows that it will be sustained by the same evidence. The present defendant has pleaded nothing he did not put in evidence in the suit which was determined by the United States Supreme Court and suggests no evidence that was not fully considered by this and by the other courts which passed upon the equity suit. That being so, his present contention must be to get a reconsideration of matters already pleaded and decided, and hence *adjudicata*. The consideration of the Record made part of this case by the stipulation reveals this beyond doubt. Reference to the defendant's brief filed in the equity case will show that he relied solely upon the points of fraud and no consideration to secure a decree in his favor as to the very self-same items covered by the offset pleaded herein, and reference to the opinion of Mr. Justice Hagner (Record, pages 234 to 245) and to the opinion of Mr. Chief Justice Alvey, of the Court of Appeals (pages 246 and 247 of Record), shows that these two "points" were especially considered by them and that the decree entered in the Supreme Court of the District of Columbia and in the Court of Appeals of the District of Columbia was strictly based upon the allegations and proofs of fraud and failure of consideration and upon the finding that Cummings "was paid from his own money."

And this court specifically and distinctly considered both of these points and after stating the findings in the courts below (169 U. S. 207), decided both of them adversely to Cummings. It said: "But neither of these views meet with our approbation," and then considers both of them at length and adds—

> "to say then that Cummings was paid by his own money necessitates deciding that the fraud was established as alleged by Cummings"—

and closes by saying—

> "because we rest our conclusion upon the application of the bar of the statutes and the *laches* of Cum-

> mings, *we must not* be considered *as intimating* that we conclude that there was either clear and convincing proof or even a preponderance of proof that the sale was as claimed by Cummings."

This expressive language of this court becomes more emphatic when we remember that the court early in its decision, said:

> "In entering upon an analysis of the evidence upon this particular subject, we shall be governed by the principle determined by this court in numerous cases, of which Stuart *vs.* Hayden, 169 U. S. decided at the present term, is the last expression, that when two courts reach the same conclusion on a question of fact, their finding will not be disturbed, unless it be clear that their conclusion was erroneous."

The two courts below had both found "fraud," and that Baker had paid Cummings "from his own money" for his interest in the inspector cases bought of him. These findings this court declared to be clearly erroneous as that part of the opinion just quoted and the discussion of the facts of the case, which follows, unmistakably demonstrates.

As said by Mr. Chief Justice Bingham of the Supreme Court of the District of Columbia in deciding this case (Appendix to this Brief)—

> "It is shown by the record that the matters that are now involved in the plea of set-off were involved in that (equity) case, that they were discussed and commented upon by the (this) court in its opinion and necessarily decided by the court. . . . In this case it seems to me not only might the matters of account between the parties have been litigated but that they were litigated and that all the matters of set-off on the part of the defendant in this case were expressly in issue and expressly litigated in the equity case."

To hold that the decree of this court did not finally settle all the matters upon which the suit of Cummings *vs.* Baker was instituted and prosecuted, would seem to be very remarkable. That Cummings is estopped by that decree from having considered in the pending suit either the claim of "fraud" or of "no consideration" as to items of account determined by that equity suit, seems quite clear, inasmuch as those contentions have certainly been decided by a court of competent jurisdiction, upon the merits, in a cause instituted by Cummings, expressly alleging that the court had jurisdiction, and possessing the four elements of identity essential to constitute *res adjudicata.*

Surely the eight years' litigation was not a farce, but it would seem very much like a farce if Cummings can now, in this suit, recover the same items and repudiate his assignment on identically the same ground as alleged in the equity suit, because, as he claims, this court has merely refused to require the cancelation and surrender of the assignment, because his application for that purpose was delayed too long.

As we have shown, this court, as a matter of fact, fully considered and discussed at length the evidence in the case relating to "fraud" and "no consideration," but in its opinion stated that it preferred to rest its decision upon the bar of limitations. Giving then the very narrowest and most unreasonable construction and effect to the decree and opinion of this court, at the very least, it certainly decided that Cummings was barred by limitations from maintaining his suit to set aside the assignment on any ground whatever. Is a decision upon such a ground a decision on the merits?

The majority of the Court of Appeals say (page 327, Record):

> "Refusal, then, to entertain a bill because of the *laches* of the complainant is not an adjudication upon the merits of the suit, and dismissal for that reason, ought not to bar an action at law involving the *same cause of action* any more than where it is

> for want of jurisdiction on other grounds or for defect in the pleadings."

In this we respectfully submit the court below erred.

In the work of the present attorney for the respondent, Mackey's Practice and Procedure relating to the District of Columbia, page 29, the nature of such a plea is stated as follows:

> "The plea of the Statute of Limitations is now regarded with the same effect as other legal defenses."

The defense of limitations is now regarded as a meritorious one.

Knodeler *vs.* Meloy, 2 MacA. 239.
Clemenson *vs.* Williams, 8 Cranch, 172.
Bell *vs.* Morrison, 1 Pet. 351.
M'Cluny *vs.* Silliman, 3 Pet. 270.
United States *vs.* Wilder, 13 Wall. 254.

Statutes of Limitations are now favorably considered. They are "statutes of repose."

Leffingwell *vs.* Warren, 2 Black, 599.
Thompson *vs.* Shepherd, 122 U. S. 231.

In Knodeler *vs.* Meloy, *supra*, in considering the nature of the plea of limitations, the Supreme Court of the District of Columbia held:

> "The plea is now regarded with the same favor as other defenses. The ancient prejudices have passed away and the prevalence of judicial opinion is now in favor of a just and reasonable construction of the statute. The Supreme Court of the United States have sanctioned this doctrine perhaps more clearly than any other tribunal. In Clemenson *vs.* Williams, 8 Cranch, 72, Chief Justice Marshall declares that 'the Statute of Limitations is entitled to the same respect with other statutes and ought not to be explained away.' In Bell *vs.* Morrison, 1 Pet. 351, the

> language of the court is still more expressive, Mr. Justice Story saying that: 'It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of the witnesses.'
>
> "To the same effect are M'Cluny *vs.* Silliman, 3 Pet. 270 and U. S. *vs.* Wilder, 13 Wall. 254. The expediency and justice of the act of limitations are now generally recognized and the authority of decisions discordant with its policy have been greatly impaired."

In Wood *vs.* Carpenter, 101 U. S. 139, where the defense of limitation was interposed to a suit to vacate certain conveyances on the ground of fraud, the plea was sustained and the court said:

> "Statutes of Limitations are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together."

It is obvious, therefore, that restricting the scope of the opinion and the decree of this court, and giving it the most limited effect, it is nevertheless a decree upon the merits of the controversy between these parties.

The Effect of the Decree is Not Limited to the Issue Decided.

The contention of counsel for the defendant, however, is, that this court must limit the effect of the decree to the

"issue" decided, which, as he claims, is the right of Cummings to a cancelation of the assignment of fees. And to sustain this view he cites several decisions of State courts.

On the other hand, we contend, the decision of this court having been upon the merits, as we have shown, is conclusive as to all questions, not only the issues decided but those which might have been decided, not only those raised but those which might have been raised.

In the first place, all the authorities say that if the second suit is between the same parties and upon the *same subject-matter*, every question which might have been decided in the first suit is considered as concluded by that suit.

The distinction is this, that if the second suit is between the same parties upon the *same subject-matter*, the first suit concludes everything which *might* have been litigated. If the second suit between the same parties but upon a *different subject-matter*, the first suit concludes only such matters as were *in issue* in the first suit. As finally settling the entire matter, we beg to quote from the opinion of Mr. Justice Field, in Cromwell *vs.* Sac County, 94 U. S. 351.

> "In considering the operatiom of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action *upon the same claim or demand* and its effect as an estoppel in another action between the same parties upon a *different claim or cause of action.* In the former case the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, including parties and those in privity with them, not only as to *every* matter which was offered and received to sustain or defeat the claim or demand *but as to any other admissible matter which might have been offered for that purpose.* . . . The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might

> have been presented, is strictly accurate when applied to the demand or claim in controversy; such demand or claim, having passed into judgment, *can not again be brought into litigation between the parties in proceedings at law, upon any ground whatever.* But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon *a different cause of action*, inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action. The difference in the operation of a judgment in the two classes of cases mentioned is seen through all the leading adjudications upon the doctrine of estoppel."

And yet the majority of the Court of Appeals (page 326, Record) say:

> "This expression, might have been decided, can not, consistently with reason, be made to include every matter of fact and law that might have been determined in a case under some contingency that did not arise. It would better mean, in our opinion, *that which ought to have been decided*—that is to say, what must have been decided *as expressly at issue*, and that also which must either have been assumed, admitted expressly or by implication, or proved, in order to warrant the judgment or decree rendered."

And the court cites the foregoing decision of this court in Cromwell *vs.* County of Sac, as supporting that proposition. But we submit that case does not at all support the view of the Court of Appeals; on the contrary, it expressly holds—

> "The language therefore, which is so often used, that a judgment estops not only as to *every* ground of recovery or defense *actually* presented in the action, but also as to *every* ground which *might have been presented*, is *strictly accurate* when applied to the demand or claim in controversy; such demand or claim, having passed into judgment, can not be brought into litigation between the parties in proceedings at law *upon any ground whatever.*"

The court below cited in support of its view Last Chance Mining Company *vs.* Tyler Mining Company, 157 U. S. 683; but that case was different in the fundamental feature heretofore mentioned, that is to say, although the former suit in which the judgment relied upon in bar was rendered, was between the same parties, it was not upon the *same subject-matter* as the second suit, and in that respect essentially differs from the case at bar. That clearly appears from the opinion of the court (page 687) where this court said:

> "The particular matter in controversy in the adverse suit was the triangular piece of ground, *which is not the matter in dispute in this action.* The judgment in that case is, *therefore*, not conclusive in this as to matters which might have been decided, but only to matters which were in fact decided.".

Naturally, in view of the limited effect of the former judgment as an estoppel, it was essential to go behind the judgment itself to ascertain the matters in fact decided.

The Court of Appeals in its decision (page 329) said:

> "The conclusion that a decree in equity is not a conclusive adjudication of the merits of the issue joined in this action at law is fully sustained by a decision of the Supreme Court heretofore cited. Phelps *vs.* Harris, 101 U. S. 370, 376, 382."

The court then proceeds to analyze Phelps *vs.* Harris and finds it parallel to the case before the court. The difference between the two cases, however, is fundamental, as will appear from an examination of Phelps *vs.* Harris. In that

case it appears that Mary B. Phelps had previously exhibited a bill in the chancery court of Washington County to remove a cloud from the supposed title raised by a partition proceeding and the will of one Henry G. Vick. The defendants relied on the validity of the partition and will and contested the plaintiff's suit. A decree was made dismissing the bill and on appeal to the Supreme Court of Mississippi, this decree was affirmed. The plaintiffs then brought an action of ejectment and one of the questions in that case was whether the decree in the chancery suit rendered the controversy *res adjudicata*. It was contended that it did not, and that the only effect of the decree was to decide a bill to remove the cloud from the title would lie, leaving the parties to their legal rights in an action at law. On this question the court below found as a fact that the power to make the partition as well as the validity of the devise were directly raised by the bill in the equity case and litigated between the parties and further—

> "that said supreme court decided that the said chancery court *had no jurisdiction thereof* and that if the said plaintiffs therein have any right to the lands described therein and which are the same for which this action of ejectment is brought, it is a *legal title* which must be enforced in an *action at law*."

The decree of the chancery court of Washington County, in the equity case, which was affirmed by the supreme court of that State was in the following words:

> "The court being of opinion that the complainants are not entitled to the relief prayed for in their bill, or to *any relief* in the premises from this court, it is therefore ordered, adjudged and decreed that the complainants' bill of complaint be, and the same is hereby, dismissed."

This court in its opinion said:

> "It is true that the court, in the former part of its opinion, discussed the question of the validity of

> the partition made by H. G. Vick and his son and held that the partition was good and that the title of Henry G. Vick was perfect, and as a consequence, that the defendant's title was also perfect, but this discussion was entered into for the purpose of showing that the title of the defendant was not so devoid of validity as to constitute a mere cloud on the title and consequently that the case was not one in which a court of equity *could* give relief. We think, therefore, that the court below was right in determining that the decree in the equity court did not render the main controversy *res judicata*, but only decided that the bill would not lie; in other words, that it was *not a proper case for the court of equity* to determine the rights of the parties."

It is obvious that the decision in that case does not in any sense support the contention made in this case. As indicated, the difference between the two cases is fundamental. In the case relied upon, the equity suit was dismissed for want of jurisdiction; in this case the equity court had unquestioned jurisdiction, and did in fact litigate the controversy, and it is immaterial which of the defenses interposed was sustained as a basis for dismissing the bill. Had the bill in equity filed by Cummings been dismissed because a court of equity was without jurisdiction, it is conceded the contention now made on behalf of the petitioner would be unsound, but it can not be contended that the court of equity did not have jurisdiction over the matter of accounting, which was the primary object and purpose of the equity suit.

Again, in Davis *vs.* Brown, 94 U. S. 423 this court said:

> "In taking this position, counsel have confounded the operation of a judgment upon the demand involved in the action, in which the judgment was rendered, with its operation as an estoppel in another action between the parties upon a *different demand*. So far as the demand involved in the action is concerned, the judgment has closed *all controversy*; its

> validity is no longer open to contestation, whatever might have been said or proved at the trial for or against it. The judgment is not only conclusive as to what was actually determined respecting such demand, but as to every matter which might have been brought forward and determined respecting it,
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> . . . . . .
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> "When a judgment is offered in evidence in a subsequent action between the same parties *upon a different demand*, it operates as an estoppel only upon the matter actually at issue and determined in the original action; and such matters, when not disclosed by the pleadings, must be shown by extrinsic evidence."

In Franklin County *vs.* German Savings Bank, 142 U.S. 93, 100–101, the court said:

> "We know of no case which goes to the extent of holding that where a court having complete jurisdiction of the case has pronounced a decree upon a certain issue, such issue may be retried in a collateral action, even although the evidence upon which the case is heard is sent up with the record. If this were possible, then in every such case where a judgment or decree is pleaded by way of estoppel, and the record shows the evidence upon which it was rendered, the court in which the estoppel was pleaded would have the power to retry the case, and determine whether a different judgment ought not to have been rendered."

United States *vs.* Bliss, 172 U. S. 326.

United States *vs.* New York Indians, 173 U. S. 472, 473.

In Werlein *vs.* City of New Orleans, 177 U. S. 390, the city of New Orleans sought to recover from Philipp Werlein a lot of land situated in that city. It appeared that one Klein recovered a judgment against the city of New Orleans and levied upon the premises in question, and advertised the same for sale, and that thereupon the city of New Or-

leans instituted a suit to restrain the sale. This last-mentioned suit came on for hearing on bill and answer, and the court entered a general decree dismissing the bill. Thereafter the property was sold pursuant to the seizure and the title became vested in Werlein. To an action of the city of New Orleans to recover possession of the lot, it was insisted that the city was concluded by the general decree of dismissal in the equity suit. The city sought to overcome this plea by showing that since the sale it had discovered that it held the property seized upon for public use only, and therefore held it in a capacity different from that in which it was sued in the injunction suit. Mr. Justice Peckham, in delivering the opinion of the court, cited with approval the several cases to which we have referred, and said:

> "The fact now alleged would have furnished in a chancery suit but another ground or reason upon which to base the claim of the city that Klein had no right to sell the property under his writ. In other words, it would have been additional proof of the cause of action set forth in that suit. The city had the right to set that fact up in its bill and to have proved it on the trial, and if proved, it would have been foundation for a judgment enjoining the sale of the property, but the fact would have been nothing more than evidence of the right of the city to obtain the injunction asked for in the chancery suit, and that it was the duty of the city to set up in that suit and to prove any and all grounds that it had to support the allegation that Klein had no right to seize or sell the property. . . . It would seem to be quite clear that the plaintiff could not be permitted to prove each independent fact in a separate suit. . . . Thus, as many different actions as the city might allege grounds for claiming the sale would be illegal, could be maintained seriatim, and no one judgment would conclude the city except as to the particular ground upon which the city proceeded in each particular case. . . . It is true that in the chancery suit the thing demanded was an injunction restraining Klein from selling the property,

> while in this suit it is a decree declaring the sale effected by Klein absolutely null and void. But the two demands, though different in terms, are in substance the same, and are *founded upon the same cause of action*, namely, the total illegality of the sale, whether threatened or accomplished."

The present case is very much stronger, because the demand of Cummings in the present case is not only in substance the same as was demanded in the equity suit, but it is the same in terms, and is founded upon the same cause of action, namely, the alleged indebtedness of Baker to him by reason of their partnership dealing.

To the same effect is New Orleans *vs.* Citizens Bank, 167 U. S. page 396.

> "No principle of the law is more inflexible than that which fixes the absolute conclusiveness of such a judgment upon the parties and their privies. Whether the reasons upon which they were based were sound or not, and even if no reasons at all were given, the judgment imports absolute verity, and the parties are estopped from disputing its correctness."
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> Cooley Const. Lim. 47 *et seq.*
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> Heroman *vs.* La. Institute of Deaf and Dumb, 34 La. Ann. 814.

The same thing was decided by Mr. Justice Harlan, on behalf of the court, in Dowell *vs.* Applegate, 152 U. S. 327.

It follows, therefore, assuming that the questions of fraud and no consideration were not in issue in the case, and were not decided, and restricting the opinion and decree to a decision upon the matter of limitations merely, a decision on the question of limitations being now considered a decision on the merits, the decree of this court concludes the defendant upon the issues of "fraud" and "no consideration" even if he had not presented them because they might have been presented in the case.

The Decree Conclusively Presumed to be on the Merits.

It will be noted that the decree of this court and that of the Supreme Court of the District of Columbia made pursuant thereto, was a general decree of dismissal without words of qualification. We submit that the decree, therefore, is *conclusively presumed* to be upon the merits.

In Durant *vs.* Essex Co., 7 Wall. 107, Mr. Justice Field said:

> "The decree dismissing the bill in the former suit in the Circuit Court of the United States *being absolute in its terms*, was an adjudication of the merits of the controversy, and constitutes a bar to any further litigation of the same subject between the same parties. A decree of that kind, unless made because of some defect in the pleadings, or for want of jurisdiction, or because the complainant has an adequate remedy at law, or upon some other ground which does not go to the merits, is a final determination. Where words of qualification, such as 'without prejudice,' or other terms indicating a right or privilege to take further legal proceedings on the subject, do not accompany the decree, it is presumed to be rendered on its merits. Walden *vs.* Bodley, 14 Pet. 156; Hughes *vs.* United States, 4 Wall. 237; Bigelow *vs.* Winsor, 1 Gray, 301; Foote *vs.* Gibbs, 1 Gray, 412.
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> "Accordingly, it is the general practice in this country and in England, when a bill in equity is dismissed without a consideration of the merits, for the court to express in its decree that the dismissal is without prejudice. The omission of the qualification in a proper case will be corrected by this court on appeal. Lindsay *vs.* Lynch, 2 Sch. & Lef. 10; Woollam *vs.* Hearn, 7 Ves. 222; Stevens *vs.* Guppy, 3 Russ. 185; Sewall *vs.* Eastern RR. Co., 9 Cush. 13; Miles *vs.* Caldwell, 2 Wall. 45; Carneal *vs.* Banks, 10 Wheat. 192; Dandridge *vs.* Washington, 2 Pet. 378; Peirsoll *vs.* Elliott, 6 Pet. 100; Gaylord *vs.* Kelshaw, 1 Wall. 83; Barney *vs.* Baltimore, 6 Wall. 289; Hobson *vs.* McArthur, 16 Pet. 195."

In Case *vs.* Beauregard, 11 Otto, 688, the court said:

> "Thus it appears, the bill exhibited all that was necessary to give to the court, sitting as a court of equity, complete jurisdiction over the subject of the controversy between the parties, and over all the equities now asserted by the complainant in his present suit. It must, therefore, be held that the decree dismissing that bill determined the equities of the case. And this must be so, whether the reasons for the dismissal were sound or not. That decree was affirmed in this court and affirmed on the merits. We regarded the case and treated it as requiring an adjudication upon the complainant's equity to be paid out of the property in the hands of the railroad company. Nothing that can now be done in another suit can take away the legal effect of the decree. Even were we of opinion that the case was erroneously decided, it would still be *res judicata*, a bar to the complainant, a protection to the defendants."

In Lyon *vs.* The Perrin & Gaff Mfg. Co., 125 U. S. 698, the court said:

> "It is well settled that in order to render a matter *res adjudicata*, there must be a concurrence of the four conditions, viz: (1) Identity in the thing sued for; (2) identity of the cause of action; (3) identity persons and parties to the action; and (4) identity of the quality in the persons for or against whom the claim is made. 2 Bouv. L. D. 467. All of these elements or conditions exist in this case, as shown by the master's report, which was to the effect that the averments of said plea were sustained by the evidence; that there was no controversy as to the identity of the cause of the action, or of the identity of the parties in the two suits; that the bill was sworn to by the complainant, and the answer was sworn to by the defendant, and the cause submitted in due course; and that the decree rendered in the suit pending in the court of Ohio was, as it professed to be, an absolute adjudication of the rights of the parties upon the merits, *without any qualifying clause*

and was conducive of the rights attempted to be litigated in this case.

. . . . . .

"This decree on its face is absolute in its terms, is an adjudication of the merits of the controversy, and, therefore, constitutes a bar to any further litigation of the same subject between the same parties. As was said by this court in Durant *vs.* Essex Company, 74 U. S. 107, 109: 'A decree of that kind, unless made because of some defect in the pleadings, or for want of jurisdiction, or because the complainant has an adequate remedy at law, or upon some other ground which does not go to the merits, is a final determination. Where words of qualification, such as "without prejudice," or other terms indicating a right or privilege to take further legal proceedings on the subject, do not accompany the decree, *it is presumed to be rendered on its merits.*'

"To the same effect see Bigelow *vs.* Winsor, 1 Gray, 299, 301, where it is said: 'Sometimes, indeed, a party plaintiff in equity, who, because he is not prepared with his proofs, or for other reasons, desires not to go into a hearing, but rather to have his bill dismissed, in the nature of a discontinuance or nonsuit in an action at law, may be allowed to do so; but we believe the uniform practice in such case is to enter "dismissed without prejudice." '

"Likewise Cooper, Eq. Pl. 270, as follows: 'A plea in bar, stating a dismissal of a former bill, is conclusive against a new bill, if the dismissal was upon hearing, and if that dismissal be not, in direct terms "without prejudice." ' See, also, Story's Eq. Pl. 793, and authorities there cited.

"The authorities to sustain this view of the case might be multiplied, but those cited are sufficient and demonstrate the uniformity of the rule."

In Am. & Eng. Encyc. Law, Vol. 21, page 273, note 1, it is stated:

"The dismissal of a bill in chancery stands nearly on the same footing as a judgment at law, and will be presumed to be a final and conclusive adjudica-

tion on the merits, whether they were or were not heard and determined, unless the contrary is apparent on the face of the pleadings or in the decree of the court. 2 Smith's Lead. Cas. 667; Moss *vs.* Ashbrooks, 12 Ark. 369; Scully *vs.* Chicago, etc. RR. Co., 46 Iowa, 528; Blackinton *vs.* Blackinton, 113 Mass. 231; Lewis *vs.* Lewis, 106 Mass. 309; Durant *vs.* Essex Co., 7 Wall. 107; Knowlton *vs.* Hanbury, 117 Ill. 471; Case *vs.* Beauregard, 101 U. S. 688; Taylor *vs.* Yarborough, 13 Gratt. 183; Strang *vs.* Moog, 72 Ala. 460."

In Tankersley *vs.* Pettis, 71 Ala. 179, the court said:

"The decree of the court of chancery, dismissing a bill absolutely and unconditionally on a hearing upon the pleadings and evidence, is an adjudication of the merits of the controversy, forming a bar to any further litigation of the same matters between same parties or their privies. A decree of that kind, unless made because of insufficient pleading, or for want of jurisdiction, or for some cause not touching the merits, if not intended to be final and conclusive, is accompanied with words of qualification, with some appropriate terms, indicating that it is not intended to preclude further suit, such as that the dismissal is without prejudice. . . . When, however, the decree of the dismissal is unqualified, *it is presumed to be an adjudication on the merits* adversely to the complainant, and constitutes a bar to further 'litigation of the same matters between the parties.' Adams *vs.* Cameron, 40 Mich. 506; Thompson *vs.* Clay, 3 T. B. Mon. (Ky.), 359; Pelton *vs.* Mott, 11 Vt. 148; Stickney *vs.* Goudy, 132 Ill. 213; Kelsey *vs.* Murphy, 26 Penna. St. 78; Foote *vs.* Gibbs, 1 Gray (Mass.), 412; Thurston *vs.* Thurston, 99 Mass. 39; Lyon *vs.* Perrin, etc., Mfg. Co., 125 U. S. 698; Hicks *vs.* Aylesworth, 13 R. I. 562; Grove *vs.* Lyford, 44 N. H. 525; Foster *vs.* The Richard Busteed, 100 Mass. 412."

In Foote *vs.* Gibbs, 1 Gray, 413, in which the complainant's bill was dismissed on motion, dismissal not being in

express terms "without prejudice," Chief Justice Shaw held:

> "The only question in this case is upon the effect of the former decree. It is a fundamental rule in the administration of justice that a question once litigated and determined between the parties, in a court of competent jurisdiction, is to be considered as at rest. But if a court does not take jurisdiction of a suit in equity, but dismisses the bill, because the plaintiff has an adequate remedy at law, or for want of prosecution, or otherwise, for some cause not embracing an adjudication on the merits, such dismissal is not a bar. There is nothing to indicate the grounds of dismissal in this case, except the fact of dismissal, after an appearance for the defendant. But the authorities, both in England and in this country, are decisive that a general entry of bill dismissed with no words of qualification, such as 'dismissed without prejudice,' or 'without prejudice to an action at law,' or the like, is *conclusively presumed* to be upon the merits, and is a final determination of the controversy."

In Bigelow *vs.* Winsor, 1 Gray, 301, the court held:

> "Sometimes, indeed, a party plaintiff in equity, who, because he is not prepared with his proofs, or for other reasons, desires not to go into a hearing, but rather to have his bill dismissed in the nature of a discontinuance or non-suit in an action at law, may be allowed to do so; but we believe the uniform practice in such a case is to enter 'dismissed without prejudice.' So, when a decree against the plaintiff in equity proceeds on the ground that he has adequate remedy at law, the course is to dismiss it without prejudice to an action at law.
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> "A plea in bar, stating a dismissal of a former bill, is conclusive against a new bill, if the dismissal was upon hearing and if that dismissal be not, in direct terms 'without prejudice.' Coop. Eq. Pl. 270."
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> "In determining what has been adjudged, the courts will regard the decree, and in case of am-

biguity, *but not otherwise*, will be governed by an accompanying opinion; where it is free from ambiguity, it speaks for itself and can not be qualified by an opinion by which it may have been preceded.

"A general dismissal of a bill may be pleaded in bar to a subsequent bill for relief on the same subject matter. For the reason that a dismissal of a bill in chancery stands nearly on the same footing as a judgment for the defendant in any action at law, the presumption is that it was a final and conclusive adjudication upon the merits, whether they were or were not determined, unless from the decree of the court it appears that they were not determined, or that fact is apparent on the face of the record."

Herman on Estoppel and Res Adjudicata, Vol. 1, p. 471.

"But a decree dismissing a bill in any United States court is absolute, and constitutes a bar to any further litigation between the same parties upon the same subject matter, unless made because of some defect in the pleadings or for want of jurisdiction, or because the complainant has an adequate remedy at law, or upon any other grounds which do not go to the merits, is a final determination. But where words of qualification are used, such as 'without prejudice,' or other terms indicative of a right or privilege to take further legal proceedings on the subject, do not accompany a decree, the presumption is that it was dismissed on its merits. This presumption is based upon the fact that where there are no words of qualification, as 'without prejudice,' the dismissal has been adjudged upon proper exceptions or other regular proceedings which brought into review the merits of the bill dismissed."

Herman on Estoppel and Res Adjudicata, 473, 474.

In New Orleans M. Co. *vs.* City of New Orleans, 14 Fed. Rep. 373, where the defense of *res adjudicata* was interposed, based upon a general decree of dismissal, which was

sought to be explained by the opinion of the court, it was held:

> "There is no doubt that if a decree is free from ambiguity, it speaks for itself and can not be qualified by the opinion by which it may have been preceded. 101 U. S. 551; 24 How. 333; 7 How. 199."

If, therefore, the decree in the equity case is conclusively presumed to be upon the merits, the equity case possessed all of the elements necessary to render *adjudicata* the several items of set-off filed in this suit, being the "identical items set up, referred to and claimed in said equity cause."

Defendant's Claim.

Much of the argument of the defendant proceeds on the theory that as some of the fees claimed in the set-off or counterclaim were received by Baker within three years of the time of filing such set-off or counterclaim, therefore, the assignment having been without consideration, he is entitled to recover the aggregate amount of such items. But this argument overlooks the fact that *so long as the assignment stands as a valid and subsisting instrument, the money which Cummings claims to belong to him, in fact, belongs to Baker.* Cummings can not go back of the assignment or set it aside because his right to do so, *for any reason whatever*, is finally concluded by the decree of this court. To adopt any other view would be to hold that the equity suit was a farce; that it concluded no one; that it decided nothing and that Cummings had the right to use the court to litigate his claims and when determined adversely to him, to repudiate the decree. Can Cummings in this law suit then say the assignment was without consideration and void, or that it was obtained by fraud? In the suit filed by Cummings, this court certainly decided that Cummings could not set the assignment aside *for any reason whatever.* It will be noted that the set-off or counterclaim was filed *more than two years after the*

equity suit. In its opinion the court stated that Cummings *might at his election have pursued a remedy for the alleged fraud in a court of law*, and that it is clear that such an action predicated upon the facts set up in the bill in the equity case would have been barred in three years from the discovery of the fraud. The court further said: "It hence follows *irrespective* of the doctrine of *laches* that the relief which the bill seeks to obtain ought not to be allowed by a court of equity." It is apparent, therefore, that the court expressly decided that Cummings was barred at law from setting aside the assignment, even though his suit for that purpose had been instituted at the same time the equity suit was instituted. But, as we have shown, his set-off or cross-action was in fact instituted more than two years *after* the equity suit. On what theory, then, can the defendant claim the right to set up any of these items of set-off in the law suit, the same being "the identical items set up, referred to and claimed in said equity cause?" As Judge Cole says in his opinion:

> "Another view of that adjudication is equally conclusive against the defendant. The Supreme Court held the equity suit to be barred on the ground that a suit at law brought at the time the equity suit was filed would have been barred. The earliest pleading of the defendant in this suit, which could by any possibility be construed to assail the sale or assignment for fraud and want of consideration was filed two years later than the bill in equity. The record, therefore, is an express adjudication that he is barred from questioning the validity of the sale and assignement at law in this suit as well as in the equity case."

In Godden *vs.* Kimmell, 98 U. S. 201, an appeal from the Supreme Court of the District of Columbia, this court clearly pointed out the difference in effect between *laches* when interposed as a defense in an equity suit based upon a matter within its concurrent jurisdiction and *laches* interposed

as a defense to a suit, the subject-matter of which is exclusively equitable. Mr. Justice Clifford in delivering the opinion of the court said:

> "Statutes of limitation form part of the legislation of every government and are everywhere regarded as conducive and even necessary to the peace and repose of society. When they are addressed to courts of equity as well as to courts of law, as they seem to be in controversies of concurrent jurisdiction, they are *equally obligatory* in both forums as a means of promoting uniformity of decisions."

Again, in the same case, this court said:

> "Equity courts in cases of concurrent jurisdiction usually consider themselves bound by the statute of limitations which governs courts of law in like cases, and this is rather in *obedience* to the statute of limitations than in analogy. Wagner *vs.* Baird, 7 How. 234."

Moreover, the same contentions, now made in this case, were made by the defendant in this court in the equity case, and this court not only considered them, but distinctly decided them. This court, in its opinion, after considering the principles which control the decision of the case, said:

> "These broad considerations of equity and justice were not applied below because it was deemed that the occasion for their enforcement had not arisen, for two reasons: First because it was thought that even if Cummings discovered the fraud in ample time to have availed himself of his rights, he was lulled into not doing so by his faith and confidence in Baker and his disinclination to believe that Baker had perpetrated so gross a fraud upon him. Second, because it was said as Cummings' share of the earned fees, upon the theory of a half and half division, was equal to the price which he received, *there was no consideration for the sale*, and the transaction was *wholly void*, hence there was no room for the application either of the Statute of Limitations or the doc-

trine of *laches*. In other words, that the partnership continued as to the inspector claims just as if no sale had been made. And the doctrine was carried to its logical outcome, since the judgment below awarded to Cummings a share in the fees earned by Baker, from contracts not under the control of the firm at the time of the sale of the interest in the inspector cases, but which were acquired by Baker thereafter.

"But *neither of these views meets our approbation.* The first is *completely answered* by the fact that the analysis of the evidence which we have made conclusively establishes that if the fraud was perpetrated as alleged, the fullest knowledge was conveyed to Cummings more than three years before he brought his suit. . . .

"The *second proposition*, conceding *arguendo* the facts are as it assumed them to be—that is, that the price was paid *Cummings from his own money*—leads in reason to an equally *impossible result*, since its consequence is substantially to affirm that neither limitation or *laches* can be applied in equity when, from a given view of the proof, it is considered that a fraud has been committed of such a nature as to avoid a contract. That this is the logical outcome of the proposition is shown by its application to the case under consideration. . . .

"To say, then, that Cummings was paid by his own money necessitates deciding that the fraud was established as alleged by Cummings. . . .

"Because we rest our conclusions upon the application of the bar of the statute and the *laches* of Cummings, *we must not be considered as intimating that we conclude that there was either clear and convincing proof, or even a preponderance of proof, that the sale was as claimed by Cummings.*"

We submit these extracts from the opinion of the court constitute a complete answer to the contentions of the defendant in this case.

Defendant's counsel, in his brief in the court below, said

in the equity suit the defendant is entitled to recover "more" than at law. And again (p. 16, Brief):

> "It is true we asked that court on the ground that as it had (as we believed) jurisdiction of a part of the matter, to settle the *entire* controversy in its court."

It seems to us that statement ought to end this controversy. The defendant not only asked the court to take jurisdiction and grant him a decree against the appellee for each and every item embraced in the set-off, but also that the assignment should be canceled, and actually obtained a decree to that effect. The stipulation admits he claimed these items in the equity suit. It admits he offered evidence in reference to the same. It admits he had an accounting in reference to the identical items, and that at one stage in the case he had a decree against the petitioner for them. He failed in the equity suit to recover the self-same items claimed in the set-off because the assignment was not vacated. How, then, can he in this suit, brought two years later, recover any of these items when he is prevented from questioning the validity of the assignment?

In 1897 the Court of Appeals of Maryland decided an interesting case where a similar effort was made to avoid the effect in a law suit of a decree in an equity suit theretofore pending between the same parties.

It is the case of Martin *vs.* Evans, 85 Md. 8, decided in 1897. That was a suit brought by Martin against Evans in trover to recover the value of certain bonds alleged to have been converted. To the declaration three pleas were filed, the second being *res adjudicata*. That plea set forth the proceedings in an equity case at one time pending between the same parties and averred that the relief sought in that case was the recovery of the value of the identical bonds for the alleged conversion of which this action was subsequently instituted. With the plea there was filed a copy of the bill in equity and of the court's opinion and the

final order dismissing the bill. To this plea the plaintiff demurred. The demurrer was sustained and an appeal was prosecuted to the Court of Appeals. McSherry, C. J., in delivering the opinion, said:

> "Now, it is not denied and it could not well be disputed at this day that if a question has once been tried and determined, without fraud or collusion, but on its merits by a court having jurisdiction of the parties to the controversy and of the subject matter involved therein, it can not again be litigated between the same parties, in the same or any other tribunal, so long as the adjudication remains unreversed and in full and operative effect.
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> "Recognizing this, the appellant seeks to avoid its application by insisting that the bill in equity was dismissed for the want of jurisdiction, and that the relief sought under it was denied, not because it was determined the plaintiff had no title to the bonds, but because it was decided there was an adequate remedy at law, and, therefore, the equity court was without jurisdiction to pass any decree adjudicating the title to the bonds at all.
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> "In the opinion the learned judge went fully into a discussion of the evidence adduced before him on the issue of the ownership of the bonds, which, it appears, were claimed to have been an *inter vivos* gift made by Reed to the plaintiff; and after a careful and critical analysis and review of all the evidence, he explicitly decided that the bonds were not the property of the plaintiff, but that they belonged to Reed. Having reached that conclusion on the merits, the judge incidentally, it would seem, observed later on in the same opinion: 'I have thus, at the request of the solicitors in the case, gone into the merits and would dismiss the bill without regard to technical objections. But it seems to be perfectly clear that this proceeding could not be sustained at any rate, as at best it would be simply a conversion

of the plaintiff's property by Reed, for which she had an ample remedy at law. If the bonds were hers, she could have recovered in the suit she had on the law side of this court, or she could have instituted an action of trover.'

"These few sentences are now seized by the plaintiff and are relied on by her to show that the equity court dismissed the bill for the want of jurisdiction to entertain it; and the inquiry comes to this: Do these extracts from the opinion demonstrate, or can they be resorted to for the purpose of showing, that the bill in equity was dismissed—not because there was no decision on the merits, but because the court was without authority to pass upon the merits at all? The merits certainly were considered, discussed and decided. The opinion, if it can be consulted to measure the scope of the final order, leaves no room to doubt this. If the merits had in reality nothing to do with the ultimate conclusion reached in the equity case, it is difficult to understand why they were considered or decided at all. And if, in fact, the bill was dismissed solely for the want of jurisdiction in the court to grant the relief asked, and not because the evidence did not justify the granting of the relief, there would have been no occasion to advert to the merits.

. . . . . .

"The decretal order itself does not show upon what ground the bill was dismissed.

. . . . . .

"Even if the opinion may be looked to for the purpose of ascertaining whether the equity court considered that there was an adequate remedy at law, still there are no qualifying words in the decretal order warranting the inference that the merits were not finally adjudicated, or indicating that the dismissal was founded on purely technical grounds. Whenever a decree dismissing a bill in equity fails to restrict its own scope, the presumption, according to the great preponderance of decided cases, is, that the issues raised by the proceedings have been dis-

posed of on their merits and they therefore become *res judicata*. When the decree of dismissal is unqualified, it is presumed to be an adjudication on the merits adversely to the complainant, and constitutes a bar to further litigation of the same matters between the parties. Tankersley *vs.* Pettis, 71 Ala. 179; Story's Eq. Pl., 793; Adams *vs.* Cameron, 40 Mich. 506; Thompson *vs.* Clay, 3 T. B. Monr. 359; Pelton *vs.* Mott, 11 Vt. 148; Stickney *vs.* Goudy, 132 Ill. 213; Kelsey *vs.* Murphy, 26 Pa. St. 78; Foote *vs.* Gibbs, 1 Gray, 412; Thurston *vs.* Thurston, 99 Mass. 39; 6 Encyc. Pl. & Pr. 993, and the large number of cases there collected.

"In Foote *vs.* Gibbs, *supra*, it was said: 'There is nothing to indicate the grounds of dismissal in this case, except the fact of dismissal after an appearance for the defendants. But the authorities, both in England and in this country, are decisive that a general entry of "bill dismissed" with no words of qualification such as "dismissed without prejudice," or "without prejudice to an action at law," or the like, is conclusively presumed to be upon the merits and is a final determination of the controversy.' And so in Durant *vs.* The Essex Co., 7 Wall. 107, the Supreme Court, in speaking of a decree dismissing a former bill between the same parties, said: 'The decree dismissing the bill in the former suit in the Circuit Court of the United States being absolute in its terms, was an adjudication of the merits of the controversy and constitutes a bar to any further litigation of the same subject between the same parties. A decree of that kind, unless made because of some defect in the pleadings, or for want of jurisdiction or because the complainant has an adequate remedy at law, or upon some other ground which does not go to the merits, is a final determination. Where words of qualification, such as "without prejudice" or other terms indicating a right or privilege to take further legal proceedings on the subject do not accompany the decree, it is presumed to be rendered on the merits.' And Walden *vs.* Bodley, 14 Pet. 156; Hughes *vs.* United States, 4 Wall. 237; Bige-

low *vs.* Winsor, 1 Gray, 301, and Foote *vs.* Gibbs, 1 Gray, 412, were cited. The case of Durant *vs.* The Essex Co., *supra*, was followed and relied on in Lyon *vs.* Perrin, etc., Mfg. Co., 125 U. S. 698.

"The broad terms of the decretal order dismissing the bill can not be limited, qualified or restricted by the opinion filed in the equity case. The opinion of the judge is the expression of the reasons by which he reaches his conclusions; these may be consistent or contradictory, clear or confused.

"The judgment or decree is the fiat or sentence of the law, determining the matter in controversy in concise, technical terms, which must be interpreted in their own proper sense. It would, we think, be a dangerous tendency to make the force and effect of the most solemn official acts depend upon the various interpretations which ingenuity might suggest to the most carefully considered language introducing them. State, use of Bruner et al., *vs.* Ramsburg et al., 43 Md. 333. Or, as succinctly expressed in Durant *vs.* The Essex Co., *supra*, the reason for the signing of a decree 'is no part of the judgment itself.' The decree, and not the opinion, is the instrumtnt through which the court acts. Wood, etc., *vs.* Fuller, 61 Md. 460.

"Agreeing, as we do, with the circuit court that the conversy involved in this case was fully and finally determined by the decree in the equity case between the same parties, we affirm its judgment with costs."

In view of the foregoing, we respectfully submit, in the language of the stipulation—

> "that the defendant [respondent] herein may not set up in bar of the plaintiff's action any of said items of set-off and counterclaim as pleaded in this action, but is concluded by the proceedings and decree in said equity cause,"—

and that, therefore, the judgment of the Court of Appeals was wrong and should be reversed, and the judgment of the Supreme Court of the District of Columbia affirmed.

Any other conclusion would indeed convert into a farce the eight years of expensive litigation between these parties. Necessarily, to say that the effect of the former unqualified decree of this court operates merely as a bar to an actual cancelation of the assignment, and that Cummings may in this suit offer precisely the same evidence again to accomplish precisely the same result, is likewise to say that Cummings may vex Baker with as many suits as he may allege grounds for vacating the assignment.

CLARENCE A. BRANDENBURG,
Counsel for Petitioner.

APPENDIX.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

HENRY M. BAKER
vs.
HORACE S. CUMMINGS. } No. 30197. Law.

WASHINGTON, D. C., November 18, 1898.

Mr. Justice COLE said:

In the case of Baker *vs.* Cummings, an action at law, the declaration seems to have been filed on the 19th day of December, 1889. The defendant Cummings, without pleading to the action at law, filed a bill in equity in the early part of February, 1890, for an injunction to restrain the prosecution of this action and to have the account settled between him and Baker, who is the plaintiff in the action at law. The grounds of equitable jurisdiction alleged were that they had been jointly interested in the prosecution of certain claims against the Government of the United States, and that fees had accumulated in which they were jointly interested and that on a certain day the plaintiff in the equity suit, Cummings, had agreed to and did assign to Baker all his interest in these fees for the sum of $15,000; and the allegation of the bill was that he, Cummings, was induced to enter into that contract by false representations made to him by Cummings, and that the sum paid, $15,000, was not more than, if even as much as he was entitled to out of the fees anyway, so that the sale was without consideration and that the amount of the fees to which he was entitled was largely in excess of $15,000, even as much as $40,000; and he prayed that the sale and assignment should be declared void, as obtained by fraudulent representations, and that the account should be settled, and Baker decreed to pay what should be found to be due on such settlement. The case

proceeded through this court and Cummings obtained a decree. The court found that the sale and assignment were fraudulent and void and set them aside, and settled the account and found a large balance in favor of Cummings. After giving him credit for the amount Baker sued for in the action at law, there was a large balance left due Cummings from Baker which was decreed to be paid him by this court; and that decree was affirmed by the Court of Appeals, but the Supreme Court of the United States reversed both decrees and directed the dismissal of the bill, which was done in this court in April or May last. The decree was a formal decree dismissing the bill by direction of the mandate of the Court of Appeals.

Now, after the filing of that bill in equity by Cummings against Baker, on February 10, 1892, two years after he had brought his bill in equity, Cummings pleaded his share of these fees he claimed as a set-off in the law suit. Of course Baker could take no action upon that plea at that time for he was enjoined from doing anything in the law cause by an injunction of the court. The matter was in controversy in the equity case and he was enjoined from proceeding in the law case and it stood that way until after the bill was dismissed in this court pursuant to the mandate of the Court of Appeals.

After the entry of the decree in this court, the plaintiff in the law case, Baker, pleaded by way of replication to the defendant's pleas of set-offs, in bar of said pleas, the adjudication in the equity suit. From this point the pleadings have been rather circuitous, culminating in a demurrer of the plaintiff to the rebutters of the defendant. There were two rebutters. They alleged that the decision of the equity case turned upon the point of the Statute of Limitations or *laches*, and that the allegation of fraud and want of consideration alleged in the pleadings in this case as grounds for avoiding the sale and assignment, were not adjudicated in

that case, and he refers to the opinion of the Supreme Court of the United States in support of the allegation.

The ground of the plaintiff's demurrer is that the Record is as much of a bar as if those questions had been expressly adjudicated. The rule upon this point is that where a case has been adjudicated upon its merits, it is a bar to further litigation between the same parties on all questions raised by the pleadings, whether they were actually decided or not. The questions of whether the sale and assignment were procured by fraud and were without consideration, were raised by the pleadings in the equity cause. The defendant's counsel admits that the question of fraud, but he denies that the question of "no consideration," was raised by the pleadings in the equity case. The Supreme Court in its opinion, however, considered that the question of "no consideration" was before that court. Counsel for the defendant replies that that part of the opinion is *obiter*. But this court must assume that the construction by the Supreme Court of the pleadings in that cause, by which it ascertained and declared that the question of "no consideration" was at issue, is correct. So that the defendant is concluded by the record referred to upon both those points if the decree dismissing the bill is a decree upon the merits.

A decree dismissing the bill is *prima facie* construed to be a decree upon the merits unless there is something in the decree itself to indicate to the contrary, and nothing of the sort is found in the decree in this case. Probably, the opinion of the court, where there is one, may be examined for the purpose or ascertaining whether the decree was on the merits where it is not expressly shown on the face of the decree itself, as is true in this case. Looking then to the opinion of the court, it appears that the decree was based upon the finding by the court that the defendant had a remedy at law for the matters stated in the bill and that the Statute of Limitations would have barred an action at law

and therefore that the period of the statute should by analogy be considered *laches* in equity. The Statute of Limitations was expressly pleaded by Baker in the equity cause and that plea has always been held by the Supreme Court to be a plea to the merits and therefore a decree sustaining that plea is a decree on the merits.

Another view of that adjudication is equally conclusive against the defendant. The Supreme Court held the equity suit to be barred on the ground that a suit at law brought at the time the equity suit was filed would have been barred. The earliest pleading of the defendant in this suit, which could by any possibility be construed to assail the sale or assignment for fraud and want of consideration, was filed two years later than the bill in equity. The Record therefore is an express adjudication that he is barred from questioning the validity of the sale and assignment at law in this suit as well as in the equity case, and it follows that the demurrer to the rebutter must be sustained.

The foregoing is a correct stenographic report of the verbal statements of the court in sustaining the plaintiff's demurrer to the defendant's rebutters.

CHAS. C. COLE.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

HENRY M. BAKER
vs.
HORACE S. CUMMINGS. } No. 30197, Law.

The opinion of Chief Justice BINGHAM *delivered on Monday, March 27, 1899:*

This case was submitted to the court to determine what the judgment of the court should be under certain contingencies. The stipulation filed in the case is as follows:

"It is hereby stipulated and agreed by and between the

parties to this cause, by their respective attorneys, that this cause may be tried by the court without a jury, the parties hereby expressly waiving the same, upon the following agreed statement of facts, subject to the limitations herein contained:

"That on the 31st day of July, A. D. 1889, and for a long time prior thereto, the plaintiff and the defendant were co-partners engaged as attorneys in the prosecution of claims against the United States, the net fees derived therefrom being under the contract of partnership equally to be divided between them, the said partners; that on the 19th day of December, 1889, the plaintiff instituted this action to recover the sum of $2,712.81, with interest from the 31st day of July, A. D. 1889; that the said sum is the identical sum referred to on pages 227 and 248 of the Record on appeal to the Supreme Court of the United States in the equity cause hereinafter referred to; that after the institution of this suit the defendant herein instituted a certain equity proceeding against the plaintiff herein in the Supreme Court of the District of Columbia, the same being known and numbered on the dockets of said court as equity cause No. 12,263; the record, decrees, and opinions of the respective courts therein, both in this and the appellate courts are hereby referred to and made part hereof; that the several items of account set forth in the pleas of set-off herein are respectively the identical items set up, referred to, and claimed in said equity cause.

"If the court on inspection of said record and proceedings in said equity cause and of the record and proceeding of this cause shall be of opinion that the defendant herein may not set up in bar of the plaintiff's action and of said items of set-off and counterclaim as pleaded in this action, but is concluded by the proceedings and decree in said equity cause, then this court may enter judgment for the plaintiff in this action for the sum of $2,712.81, with interest thereon from the 31st day of July, A. D. 1889, as claimed in his declaration, herein, but if the court shall be of opinion that

any of said items of set-off and counterclaim may be set up in bar of the plaintiff's action herein, then this cause shall be remanded to the docket for trial by jury. Both parties hereto reserve the right of appeal or by writ of error from the judgment of this court or of any court of review passing hereon and also any other remedy which they may by law be entitled to."

From this stipulation, it is manifest, the decision of this case involves substantially the question whether the decree of the Supreme Court reversing the decrees of the Court of Appeals of this District and the Supreme Court of the District is a substantial adjudication of the matters set forth in the pleas of set-off filed by the defendant in this case. It is agreed that the items in the pleas of set-off in this case are precisely the same as the matters of account set forth in the bill in equity and that the court had all of these matters before it at the time of these respective adjudications. Testimony was taken, the case was referred to the auditor, testimony was taken before him by each of the parties *in extenso* and a report was made by the auditor which was confirmed by the Supreme Court of the District of Columbia, which rendered a decree in favor of the complainant in the equity suit. From that decree an appeal was prosecuted to the Court of Appeals and there was an affirmance by that court of the decree of the Supreme Court of the District of Columbia. An appeal was taken to the Supreme Court of the United States which resulted in the reversal of the decision of the courts below and of the entry of a decree dismissing the bill generally, without any words of limitation. It is shown by the Record that the matters that are now involved in the plea of set-off were involved in that case, that they were discussed and commented upon by the court in its opinion and necessarily decided by the court. It is a general rule of law that not only are all things which are directly pertinent to the litigation, and which are expressly litigated, adjudicated, but also all things which might have been litigated under the issues—that they are

to be construed as disposed of by the decree. In this case it seems to me not only might the matters of account between the parties have been litigated but that they were litigated and that all the matters of set-off on the part of the defendant in this case were expressly in issue and expressly litigated in the equity case. The decree of the Supreme Court reversing the court below, which had been in favor of Cummings, puts an end to the litigation.

This same matter has been once directly involved by a demurrer which was filed to the pleas. That demurrer was heard by Mr. Justice Cole and a decision rendered by him sustaining the demurrer. In sustaining that demurrer, as appears by the record, he decided the very question that is now before me in a different form. It is a rule from which we never depart, except for some very ample reason, that where a matter in a case has been once determined, whether of law or fact, by one justice of this court, that another justice of this court will not attempt to consider or reverse the former decision while that decision remains unreversed. From a reading of the opinion of Justice Cole, it is manifest he considered the same question. That alone would prevent me from finding for the defendant upon this stipulation; but beyond that, I have examined the Record sufficient to satisy myself that the decision of Justice Cole is entirely correct and one that I would have made if I had been in his place. There is no opportunity for criticising or reversing that decision.

The stipulation here is that if a court on inspection of the record and proceedings in the equity case and of the record and proceedings in this case, shall be of opinion that the defendant may not set up in bar of the plaintiff's action any of the items of set-off and counterclaim as pleaded in this action, judgment may be rendered for the plaintiff with interest. As I am of the opinion that the defendant may not set up in bar of the plaintiff's action any of the items of set-off, judgment will be rendered for the plaintiff for the amount claimed.

No. 207.

Office Supreme Court, U.S.
FILED
MAR 13 1901
JAMES H. McKENNEY,
Clerk

Brf. of Conrad & Mackey for Def
Con m

Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed Mar. 13, 1901.

No. 207.

HENRY M. BAKER, PETITIONER,

vs.

HORACE S. CUMMINGS.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

MOTION OF DEFENDANT CUMMINGS TO DISMISS FOR WANT OF JURISDICTION AND BRIEF IN BEHALF OF MOTION TO DISMISS.

HOLMES CONRAD,
FRANKLIN H. MACKEY,
Attorneys for Defendant.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 3-13-'01

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 207.

HENRY M. BAKER, PETITIONER,

vs.

HORACE S. CUMMINGS.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Motion of Defendant Cummings to Dismiss for Want of Jurisdiction.

Now comes the defendant, Horace S. Cummings, and, by his attorneys, moves the court to dismiss this cause because it appears on the face of the record that the amount in controversy is less than five thousand dollars.

HOLMES CONRAD,
FRANKLIN H. MACKEY,
Attorneys for Defendant.

CLARENCE A. BRANDENBURG, Esq.,
Attorney for Petitioner:

Take notice that when this cause is reached on the call for argument we shall bring the above motion to the attention of the court and ask the granting of the same.

HOLMES CONRAD,
FRANKLIN H. MACKEY,
Attorneys for Defendant.

Service acknowledged this 12th day of March, A. D. 1901.

C. A. BRANDENBURG,
For Petitioner.

Brief in Behalf of Motion to Dismiss.

1. The amount claimed by Baker in his declaration (Rec. / —) is $2,712.81, with interest thereon at 6 per cent. per annum from July 31, 1889, to February 19, 1900, the latter being the date of the filing of petition of certiorari herein, the aggregate of principal and interest up to said date being less than $5,000—that is to say, $4,430.01.

2. Cummings by his claim shows that the greatest amount he can recover under his plea of set-off (Rec., 8) is one-half of 25 per cent. of the amount received by Baker on the "Inspector cases" since February 10, 1889, that date being three years prior to the filing of his plea of set-off, and this also amounts to less than $5,000—to be exact, $4,937.58—as appears from the items of the bill of particulars filed with said plea of set-off, which items are as follows:

Name of claimant.	Date when collected.	Amount collected.
Butler, John H	March 21, 1889	$907.71
Call, Henry	March 22, "	687.00
Dearborn, Benjamin C	March 25, "	207.00
Fleury, Allen S	March 27, "	1,028.59
Grady, John E	March 23, "	403.67
Haggerty, James S	March 22, "	1,448.07
Lee, William G	March 22, "	699.66
Lander, Peter	March 23, "	711.00
Morris, Charles H., ex'r	March 25, "	2,699.33
Morris, Albert, ex'r	March 26, "	2,699.33
Oliver, W. W	March 23, "	769.58
Paine, Philip H	March 25, "	1,682.98
Ramsdell, T. J	March 23, "	2,466.87
Ricard, Mary	March 23, "	1,411.76
Singer, Sarah N	March 21, "	1,035.00
Starkweather, J. H	March 21, "	188.70
Smith, James B	March 21, "	2,007.82
Smith, James B	March 21, "	771.40
Starkweather, J. H	March 21, "	496.22
Thomas, Edward A	March 22, "	148.32
Welsh, David C	March 23, "	1,459.05
		$23,868.97
Fee of 25 per cent. on this amount is		5,967.24
One-half of this amount being Cummings' share.		2,983.62
Interest on last from March 21, 1889, to February 19, 1900		1,954.27
Making total amount of Cummings' share, with interest		4,937.89

The foregoing statement shows that in no event can either party in this action recover as much as $5,000. The case should therefore be dismissed for want of jurisdiction.

HOLMES CONRAD.
FRANKLIN H. MACKEY.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 207.

HENRY M. BAKER, PETITIONER,

vs.

HORACE S. CUMMINGS, DEFENDANT.

The proceedings out of which arose the questions presented on this appeal occurred in the following order of event:

1889, December 19.—In the action at law of *Baker vs. Cummings*, the declaration and the particulars of demand were filed.

1890, February 1.—The bill in equity of *Cummings vs. Baker*, to restrain Baker from the prosecution of his action at law, to have the assignment in writing set aside, and for general relief, was filed.

1892, January 29.—The injunction restraining the prosecution of the action at law was dissolved (Record, p. 14).

1892, February 10.—Cummings *files his* plea of set-off and bill of particulars of his counter-claim to Baker's action at law.

1892, August 24.—Baker joins issue on Cummings' plea of set-off.

1898, February 21.—Supreme Court of United States reverses the decree of the lower court in the equity cause, and remands the cause with direction to dismiss the bill because the same was not filed in time.

1898, June 16.—Baker obtains leave and files special replications to Cummings' plea of set-off.

1898, December 13.—Baker joins issue on Cummings' plea.

To Cummings' plea of set-off, with the bill of particulars of his counter-claim, Baker filed his replication on the grounds—

1. That he never promised as alleged in the plea.

2. That "the said supposed causes of action or claims of said defendant in said plea of set-off did not accrue, nor did any of them accrue, to the said defendant at any time within three years next before the filing of said plea," &c.

3. That Cummings had, in consideration of $15,000 paid to him by Baker, assigned to Baker all of his right and interest in and to the inspector fees, and that the items of Cummings' claim in his plea of set-off were all included in such assignment.

4. That the dismissal of the bill in equity, under the mandate of the Supreme Court, directed in its decree in Baker *vs.* Cummings, was a full and complete adjudication of all the matters embraced in the demand made by Cummings in his plea of set-off and a bar to further recovery under that plea.

Upon this replication followed rejoinders, rebutters, surrebutters, &c., all of which issued finally in the questions: Did the statute of limitations bar all of the items in defendant's particulars of counter-claim? Was the assignment obtained by fraud and misrepresentation? And, Was the decision of the Supreme Court of the United States a final adjudication of the matters at issue between the parties?

The issues joined on the plea of limitations and on the fraudulent procurement of the written assignment are held

in abeyance until the final decision of that raised on the plea of *res judicata*.

The only question submitted to and decided by the Court of Appeals was whether the dismissal of the bill in equity was such an adjudication of the case as will support the plea of *res judicata*, and this appeal is free from the decree of that court holding that inasmuch as the bill was not dismissed on its merits, but because the complainant came too late to obtain relief in that forum, that it cannot bar him from obtaining such relief under his plea of set-off in the action at law as he may there show himself entitled to.

The bill in equity was filed for the purpose of having rescinded, canceled, and set aside the written assignment from Cummings to Baker, on the ground that it had been procured by fraud and misrepresentation. It alleges, among other things, as follows:

"And the complainant avers that he was by the wrongful act of the defendant in the premises, and by means of the said untrue, false and misleading representations as to the amount of said fees, induced to execute said paper-writing purporting to be an assignment of the complainant's interest in said inspector cases, and he therefore says that the defendant holds the said assignment against equity and good conscience, and that the same ought to be regarded as null and void and of no effect whatever," &c.

The bill then recites the institution of the action at law by the said Baker against him, and says:

"That the said suit at law is not yet at issue, but that the time for pleading thereto has nearly approached, and that complainant cannot, under the rules of pleading at law, incorporate in his plea the equitable defenses herein set forth and which, in a court of equity, would prevail against the defendant's demand, and especially is the equitable right of the complainant to have discovery in the premises, and to have the said assignment canceled and held for naught, a matter not cognizable in a court of law."

The answer of the defendant Baker to the bill clearly recognizes what the object and purpose of the bill is, viz., to set aside the written assignment. It says (page 44):

"The defendant, further answering, says this is an attempt on behalf of the complainant, after the lapse of more than three years, with the full knowledge of all the facts, to attack said sale as void; the claim here made by complainant is old and stale, and such as is not favored in equity, and especially ought such demands as this to be frowned down by equity after the lapse of this period of time, and during the whole period and over of three years the complainant has not said nor made any effort against the *bona fides* of said transaction, and the complainant here pleads the statute of limitation in his behalf; that said claim did not accrue, nor was any demand made to show error or otherwise by complainant to defendant within three years."

The Supreme Court of the District of Columbia and the Court of Appeals were both of the opinion that under the facts of the case Cummings should not be debarred by the lapse of time from having an inquiry into the *bona fides* of the assignment and from an accounting, it appearing that while the alleged assignment was made on September 6, 1886, that the partnership between the parties continued until September 1, 1889, and the bill in equity was filed by Cummings February 1, 1890—that is, within three years and four months after the date of the assignment.

But the Supreme Court of the United States was of opinion that both the lower courts erred in their judgments, and it reversed the decree of the Court of Appeals and remanded the cause to that court with directions to set aside the decree of the Supreme Court of the District of Columbia and to remand the cause to that court with instructions to dismiss the bill.

Now, two inquiries arise here:

(1.) Was the dismissal of the bill in equity, under the conditions stated, such an adjudication of the case as will

support the plea of *res judicata* to the action at law or to the counter-action under the plea of set-off?

Walden et al. vs. Bodley et al., 14 Peters, 156, was a controversy that had been protracted for more than forty years. Judgments in ejectment were recovered in 1800. In the same year a bill was filed and an injunction was awarded. This bill was dismissed in 1809 for want of jurisdiction. In 1812 another bill was filed, and this was dismissed by the parties in the clerk's office. In 1825 the last bill was filed. The court, in its opinion, said (page 161):

"As the first bill was dismissed for want of jurisdiction and the second by the complainants at rules, in the clerk's office, it is clear that neither can operate as a bar to the present bill. A decree dismissing a bill *generally* may be set up in bar of a second bill having the same object in view, but the court dismissed the first bill on the ground that they had no jurisdiction, *which shows that the case was not heard on its merits*, and this also appears from the dismissal by the party of the second bill, in the clerk's office."

Hughes vs. United States, 4 Wallace, 233, was an information in the nature of a bill in equity filed by the United States against Hughes for the repeal of a patent issued to him in 1841. Hughes plead that he had obtained two judgments in two separate suits. One of the suits had gone in Hughes' favor; the other was dismissed for want of jurisdiction and absence of proper parties, and generally because it was defective, uncertain, and insufficient in the statement of the cause of action. In affirming the judgment below this court, speaking through Justice Field, said:

"In order that judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties, or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits. If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any

ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit."

Smith vs. McNeal, 109 U. S., 429.

7 *Robinson's Practice*, 185.

The single question decided in *Baker vs. Cummings*, 169 U. S., 189, was that Cummings had waited for more than three years after he had notice of the deceit practiced upon him before he filed his bill to set aside the written assignment, which was the fruit of that deceit, and that this delay in the assertion of his rights constituted laches, which deprived him of the right in that forum to have the relief he asked.

In its opinion (page 196) the court said:

"The controverted issue arising from the foregoing unquestioned facts is this: Cummings claims that he did not derive knowledge of the fraud he complains of from the matters just stated, whilst Baker asserts that if the fraud in the purchase complained of by Cummings had existed, full knowledge thereof was conveyed to Cummings by the facts above stated, and that the silence of the latter and his inaction for years, and until Baker had made claim for money and stated his intention to dissolve the partnership, not only establishes the want of foundation for Cummings' assertion that there was misrepresentation and fraud in the sale, but also makes clear the fact that the right to make such claim was barred, both by limitations and laches, when the demand of Cummings was actually preferred."

And later on the court say (page 169):

"We will defer an examination of the testimony as to the existence of the fraud and misrepresentation complained of until we have passed on the charge that if there was fraud and misrepresentation Cummings had full knowledge thereof immediately after the sale. We adopt this order of consideration, because if it be found that such was the case the question whether the fraud originally existed will become immaterial, in view of the defenses of limitation and laches."

And the court concludes its opinion by saying (pages 208, 209):

"But the principle by which the bar of the statute of limitations is enforced by a court of equity and upon which the doctrine of laches rests is that equitable powers will not be exercised to discover whether one has been wronged when, with full knowledge of the alleged wrong, he has allowed the bar of the statute of limitations to arise, and has slept upon his rights until such a situation has arisen as to render it inequitable to afford him relief."

And—

"Because we rest our conclusions upon the application of the bar of the statute and the laches of Cummings, we must not be considered as intimating that we conclude that there was either clear or convincing proof, or even a preponderance of proof, that the sale was as claimed by Cummings."

So the court of equity refused to entertain the prayer of Cummings that the written instrument of assignment executed by him to Baker be rescinded and set aside because it had been procured by the fraud of Baker. That court would not even consider the case presented by Cummings, because, as it said, he had delayed his coming too long.

Now, let it be borne in mind that Cummings was at that time and has ever since been in a court of law at the suit of Baker, who demanded judgment against him for money. Cummings had presented his defense to that action by setting up a counter-claim against Baker through pleas of set-off, under a local statute. To this plea Baker had replied by setting up the written assignment to himself from Cummings of the very claims which Cummings was now asserting ownership of by his plea. It was then solely in aid of his defense that Cummings had resorted to the court of equity for the rescission and cancellation of this written assignment. The court of equity had, as we have seen, refused to entertain his prayer, and now it is insisted here by Baker that the refusal of the court

of equity to entertain Cummings' prayer for certain purely equitable relief was an adjudication by that court of the very matter which that court had refused to consider at all, and that the decree of the court of equity, dismissing the bill because it was filed too late, is a good bar to the claim asserted by his plea of set-off by Cummings in the legal action. Cummings' claim in the court of equity was to have the written assignment set aside, and then, that court having obtained jurisdiction over the subject-matter and the parties, might proceed further to so adjudicate all the questions that would follow upon the vacation of that assignment as to make a complete decree, fully and finally disposing of the entire case. But the court of equity declined to take the initial step—it refused to entertain the case presented by the bill at all, for any purpose, and so Cummings' bill in equity was dismissed.

Cummings' claim in the court of law is not to have the written assignment set aside, but it is to have certain claims allowed him, an itemized statement of which he files with his plea.

The argument of the petition here is that the court of equity might have passed upon all the questions presented by the bill, and because it might have done so, and did dismiss the bill generally, it must here be presumed to have done so, and thus to have adjudicated the matter on its merits.

But the opinion of the Supreme Court states expressly and very plainly exactly what it did pass upon, and it appears there that it did not consider the question at all that is presented in this action at law under the plea of set-off.

The petitioner, however, insists that we cannot look at the opinion of the court at all—that we are limited and controlled absolutely by the terms of the decree of that court.

Well, so be it. The decree of the Supreme Court, as it appears on page 209, begins as follows: "It follows," &c. Follows what? Something that precedes, as to which the

decree is both *post hoc* and *propter hoc*. Does not this language make the opinion part of the decree? Does the interposition of a period rather than a semicolon separate the two?

Why did the court dismiss the bill of Cummings, instead of merely denying his right to have the written assignment set aside? That bill prayed for a settlement and statement of the partnership accounts between the parties. The partnership was not dissolved until September 1, 1889, and the bill was filed February 1, 1890. There was no question of laches or limitation as to that relief, and there could be no question as to the right of one partner to resort to equity, against his partner, for settlement of their accounts. That is a distinct head of equitable jurisdiction and relief. Why was it denied to this complainant by the dismissal of his bill? For one only possible reason. The court recognized that while the bill set out all the facts which were material for a complete decree between the parties, the only question presented for its consideration was the rescission of the written assignment, and it declined to consider that because presented too late.

Now, that being so, by what course of reasoning can it be maintained that a decree which merely dismissed a bill because it was filed too late to be considered by a court of equity was an adjudication by that court, not merely of the single question which that court refused to consider, but of all other questions raised by the bill and which that court might have decided, had it entertained the bill and considered and decided the preliminary question? How can the refusal of the court to consider the case presented by the bill in equity be an adjudication of the case presented in the action at law on the defendant's plea of set-off? If Cummings, the defendant, is estopped by the decree in the equity suit from prosecuting his counter-claim against Baker, why is Baker not equally estopped by the same decree, and for the same reasons, from the prosecution of his claim against

Cummings in that same action? Surely the equity court could not have ascertained and adjudicated Cummings' rights, upon a settlement of the partnership accounts, without, at the same time and in the same proceeding, having ascertained and adjudicated Baker's rights, which are now being asserted in his action at law. How can it be said that the decree of the court of equity, which applied equally to both parties, operates to bar the defendant from asserting his counter-claim, while it does not so operate as to bar the plaintiff from asserting his claim, when both claim and counter-claim formed parts of the same partnership account?

Laches and the statute of limitations apply only to the remedy, not to the right. One may be barred from a remedy in a court of equity, while not at all impaired as to his remedy for the same cause of action in a court of law.

The bar of the statute of limitations applies, in this District, after three years, while across the river, in the city of Alexandria, it is five years. Suppose the holder of a note in this District finds here the maker or endorser, who are residents of Alexandria, and sues them on the note, which was made and payable in Alexandria. They plead the statute of limitations of the *lex fori*, and are successful. He then sues them in the city of Alexandria. Can they prevail there on a plea of *res judicata* of the judgment here in their favor? They would speedily be told that the period that served in Washington to bar the remedy there would not serve in Alexandria, where five years was the bar.

The discussion of the whole matter in the opinion of the Court of Appeals, delivered by Mr. Justice Shepard, might have been relied on by us as affording an exhaustive argument in support of the conclusion reached by that court. We refer to it now as exhibiting grounds which do not require reinforcement at our hands and upon which we are content to submit the case.

FRANKLIN H. MACKEY,
HOLMES CONRAD,
For Defendant.

23260

Supreme Court of the United States.

No. 207.—October Term, 1900.

Henry M. Baker, Petitioner, vs. Horace S. Cummings. } On writ of certiorari to the Court of Appeals of the District of Columbia.

[April 15, 1901.]

The petitioner (plaintiff below) commenced this action at law in the Supreme Court of the District of Columbia on December 19, 1889, to recover from the defendant the sum of $2,712.81 with interest at six per centum from July 31, 1889, and annexed to his declaration a bill of particulars of his demand. Plaintiff claimed in his declaration that the money was due, among other things, on an account stated between the parties. The plaintiff obtained judgment in the trial court for the amount of his claim, which was reversed by the Court of Appeals of the District.

A case between the same parties and growing out of the same transaction has already been before this court and decided, (169 U. S. 189.) The question in this case involves the construction and effect of that decision, and therefore a writ of certiorari was applied for and granted, and the case brought here.

Soon after the commencement of this action and before pleading to the declaration filed therein, Cummings, the defendant, commenced a suit on the equity side of the Supreme Court of the District against Baker for the purpose of enjoining him from the further prosecution of this action, and to obtain a full and complete accounting under the order and direction of the court between complainant and Baker in respect to the partnership dealings alleged and set up in the bill, and he prayed that the defendant should be decreed to pay to him the amount which should be found due him and for other relief. In his bill the complainant alleged the formation of a copartnership on January 1, 1876, between the parties, to prosecute the practice of the law in the city of Washington, terminable by mutual consent, each to share equally in all the profits and losses of the business, and it was averred that the partnership continued until September 1, 1889, when it was dissolved. It was then alleged that the terms of the dissolution were agreed upon through false and fraudulent representations of Baker as to the condition of the partnership affairs in relation to what were called "the inspector cases," made to the complainant, with the facts in regard to which the defendant was, as the complainant alleged, much more familiar than the complainant, and that, based upon the misrepresentations, terms of agreement for dissolution were arrived at, and in carrying out the same the complainant assigned by a written assignment

his claims under the partnership to all moneys then due or that might thereafter become due arising from those cases, and as consideration therefor the complainant received from the defendant the sum of $15,000; that instead of the amount stated by the defendant to be due the partnership in relation to the cases mentioned, a very much larger amount was due, and instead of there being only a certain named amount of claims in cases where no Congressional appropriation had been made, as stated by the defendant, a very much larger amount existed to his knowledge, of which the complainant was ignorant, and upon the faith of these untrue and fraudulent statements the complainant assigned by a written assignment all his interest in the cases for a sum largely below the amount actually belonging to him under the terms of the partnership.

The complainant then alleged the commencement of an action at law by Baker against him to recover $2,712.81, and stated that appended to the declaration in that action was a bill of particulars of Baker's claim, and that all of the items in that bill of particulars originated in and grew out of the partnership dealings of the parties and not otherwise, and that only by a full, proper and complete accounting and discovery, under the order and direction of a court of equity, could a proper adjustment be had of the rights of the complainant and defendant growing out of their partnership dealings.

Complainant further alleged that the action at law was not yet at issue, but that the time for pleading thereto had nearly approached, and that the complainant could not, under the rules at law, incorporate in his plea the equitable defenses herein set forth, and which in a court of equity would avail against Baker's demand, and especially that the equitable right of the complainant to have discovery in the premises and to have the said assignment cancelled and held for naught was not cognizable by a court of law, and that if the defendant (Baker) were therefore permitted to prosecute his action at law against the complainant, the latter would be deprived of his defenses to that suit which were set up in the bill, and the complainant therefore alleged that he was entitled to have the defendant enjoined from prosecuting his action at law, and to have the court order and direct a full and complete accounting between the complainant and defendant in respect to their partnership dealings. An order was thereupon issued restraining the further prosecution of this action, which order was subsequently and about February 1, 1892, dissolved.

To this bill the defendant Baker filed an answer February 10, 1890, denying all allegations of fraud in the settlement between the parties or in the procuring of the assignment, and also alleging that he furnished the complainant with all needed data, and all the data and information which existed in connection with the facts within his control, and that the settlement was made with full knowledge of all the facts on the part of the complainant, and that after such settlement was made he left in the possession

of the complainant papers and accounts plainly showing the whole transaction and all the facts in regard to the case, an examination of which would give all necessary information about the partnership affairs. He also alleged that the complainant was endeavoring, after a lapse of more than three years and with a full knowledge of all the facts, to attack this settlement as void, and he alleged that the claim made by the complainant was old and stale, and he pleaded the statute of limitations in his behalf, and alleged that the claim did not accrue nor was any demand made to show whether error or otherwise were made within the period of three years.

After the injunction restraining the further prosecution of this action had been dissolved, and on February 10, 1892, the defendant filed a plea to the declaration herein, in which he denied, (1) that he was indebted to the plaintiff; (2) he alleged that he never promised as set up in the declaration; (3) that the plaintiff's cause of action did not accrue within three years; (4 and 5) a set-off of $35,873.35. This set-off was alleged to have arisen out of the dealings between the parties in the partnership already mentioned.

The plaintiff Baker joined issue upon the plea on August 24, 1892. Further proceedings in this action were delayed by mutual consent until the trial of the suit in equity. Upon that trial the complainant obtained a decree for thirty-odd thousand dollars, after deducting the amount claimed to be due the plaintiff in this action. That decree was affirmed by the Court of Appeals of the District, and the case was taken by appeal to this court, where the decrees of the courts below were reversed and the case remanded with instructions to the Supreme Court to dismiss the bill. The dismissal was general, and not "without predjudice" or any similar expression. (169 U. S. 189.) After the entry of the decree dismissing the bill on the mandate of this court in the equity suit, Baker, the plaintiff herein by leave of the court filed in this action a replication to the plea of set-off, setting up the commencement of the equity suit, and stating the issues involved therein and the decree made upon the decision of this court dismissing the bill, and claimed that judgment as *res adjudicata* of the matters of set-off contained in the fourth and fifth counts of the defendant's plea. Then by a series of pleadings, too long and too technical for repetition, the final question was raised by demurrer as to whether the plaintiff's replication of *res adjudicata* to the defendant's plea of set-off was good or not. Upon the argument of the demurrer the Supreme Court held that the replication was good; that the merits of the whole case had been decided in the equity suit, and that the judgment in that suit was a bar to all claims of set-off on the part of the defendant Cummings in the action at law. The parties came to trial after the argument and decision upon the demurrer, and having waived a jury the following stipulation was filed:

"It is hereby stipulated and agreed by and between the parties to this cause, by their respective attorneys, that this cause may be tried by the court without a jury, the parties hereby expressly waiving the same, upon the following agreed statement of facts, subject to the limitations herein contained:

"That on the 31st day of July, A. D. 1889, and for a long time prior thereto, the plaintiff and the defendant were copartners engaged as attorneys in the prosecution of claims against the United States, the net fees derived therefrom being under the contract of partnership equally to be divided between them, the said partners; that on the 19th day of December, A. D. 1889, the plaintiff instituted this action to recover the sum of $2,712.81, with interest from the 31st day of July, A. D. 1889; that the said sum is the identical sum referred to on pages 227 and 248 of the record on appeal to the Supreme Court of the United States in the equity cause hereinafter referred to; that after the institution of this suit the defendant herein instituted a certain equity proceeding against the plaintiff herein in the Supreme Court of the District of Columbia, the same being known and numbered on the dockets of said court as equity cause No. 12,263; the record, decrees and opinions of the respective courts therein, both in this and the appellate courts, are hereby referred to and made part hereof; that the several items of account set forth in the pleas of set-off herein are respectively the identical items set up, referred to and claimed in said equity cause.

"If the court on inspection of said record and proceedings in said equity cause and of the record and proceedings of this cause shall be of opinion that the defendant herein may not set up in bar of the plaintiff's action any of said items of set-off and counter-claim as pleaded in this action, but is concluded by the proceedings and decree in said equity cause, then this court may enter judgment for the plaintiff in this action for the sum of $2,712.81, with interest thereon from the 31st day of July, A. D. 1889, as claimed in his declaration herein, but if the court shall be of opinion that any of said items of set-off and counter-claim may be set up in bar of the plaintiff's action herein, then this cause shall be remanded to the docket for trial by jury. Both parties hereto reserve the right of appeal or by writ of error from the judgment of this court or of any court of review passing hereon, and also any other remedy which they may by law be entitled to."

Upon this stipulation in connection with the record in the equity suit, the Supreme Court held that the defendant Cummings could not in this action set up in bar to plaintiff's action any of the items of set-off attached to his plea, and therefore judgment was rendered for the plaintiff for the amount claimed by him. On appeal to the Court of Appeals the judgment was reversed, and a new trial granted, Mr. Chief Justice Alvey dissenting.

Mr. Justice PECKHAM, after making the above statement of facts, delivered the opinion of the Court.

A perusal of the record in this case demonstrates at least how conservative Congress has heretofore been in relation to the adoption of any amendment of the law relating to pleading and procedure in the District

of Columbia. The last of the series of pleadings herein by which the question of the validity of the defense of *res adjudicata* was finally brought before the court is denominated "defendant's joinder of issue on plaintiff's second sur-rejoinder to defendant's fourth rejoinder to plaintiff's third replication." Replications, rejoinders, sur-rejoinders, rebutters, sur-rebutters and demurrers abound, and they all seem to have been regarded as properly filed for the purpose of presenting the question whether the decree in the equity case was *res adjudicata* or not. In reading these pleadings we seem to be transported back to the days when the practice of the special pleader had become a science by itself. In spite of the pleadings, however, the question before us is a simple one.

The plaintiff brought this action to recover from the defendant a certain amount of money alleged to be due on an account stated between the parties. The defendant, before pleading in the action, commenced a suit in equity for an accounting between himself as complainant and the defendant in the equity suit in relation to all partnership matters, and, as a part of the relief, prayed the cancellation of a written assignment made by complainant of his interest in the inspector cases of the partnership to the defendant, procured, as complainant alleged, by fraud. It was alleged that the items of the claim of Baker, the plaintiff in this action, arose out of the partnership transactions, and they were included in the issue made in the equity suit. There was a full hearing in that suit in regard to all the matters between the parties, including those arising in this action. At the end of the hearing the trial court entered a decree in favor of the complainant for over $30,000, after deducting the amount claimed against him by the plaintiff herein. That decree was affirmed by the Court of Appeals, but upon appeal here both decrees were reversed and the cause remanded to the lower court with instructions to dismiss the bill. The court, upon the receipt of the mandate, did dismiss the bill with costs. The plaintiff in this action then proceeded with his case and set up, by leave of the court, the decree in the equity suit as an adjudication of all the matters relating to the validity of the defendant's set-off to his demand, and the question is, Shall the adjudication be treated as conclusive upon those matters, or shall the inquiry be again entered upon as to the facts upon which the set-off rests?

Stated generally and without detail, the theory of the law is that matters which have once been fully investigated between the parties and determined by the court shall not be again contested, and that the judgment of the court upon matters thus determined shall be conclusive on the parties and never subject to further inquiry. The whole doctrine has been lately gone over in this court in *Southern Pacific Railroad Company* v. *United States*, (168 U. S. 1,) and the law in regard to it is so well settled that other citations are not required. The question is not what the doctrine is, but does it apply to the particular case?

We have to inquire, therefore, whether the decree in the equity suit did cover and conclude the matters in difference, regarding the defendant's set-off in this action? If it did, that decree must be treated as conclusive, and the judgment of the court below refusing to give that character to it must be reversed.

It appears by the stipulation between the parties that the several items of account set forth in the defendant's plea of set-off in this action are respectively the identical items set up, referred to and claimed by complainant in the equity cause. The record in the equity cause is made a part of the record herein, and the facts upon which the complainant proceeded are set forth in the report of that case in this court, already referred to. The mandate from this court in that case, which by stipulation of counsel has been included in the record herein, sets forth our decree, which reversed the decree of the Court of Appeals with costs, and ordered that the cause be remanded to that court with directions to set aside the decree of the Supreme Court of the District of Columbia, and to remand the cause to that court with instructions to dismiss the bill. There was added the usual formula directing that such further proceedings be had in the cause in conformity with the opinion and decree of this court as ought to be had, &c. The proceedings, however, which were thus directed to be taken were simply to reverse the judgment of the lower court and to dismiss the bill. It was not a conditional dismissal, without prejudice, or words to that effect, but a general one. A dismissal of the bill under such directions is presumed to be upon the merits, unless it be otherwise stated in the decree of dismissal. (*Walden* v. *Bodley*, 14 Pet. 156, 161; *Hughes* v. *United States*, 4 Wall. 232, 237; *Durant* v. *Essex Company*, 7 Id. 107; *Bigelow* v. *Winsor*, 1 Gray, 299, 301; *Foote* v. *Gibbs*, Id. 413; Coop. Eq. Pl. 270; 1 Herman on Estoppel, secs. 151, 152.)

It cannot be disputed that if the bill had been dismissed upon the merits it would be conclusive against the right of the defendant in this action to set up in bar of plaintiff's recovery any of the items of set-off and counter claim pleaded by defendant. He contends, however, that for the purpose of determining the ground upon which the bill was dismissed it is proper to resort to the opinion of the court, even though the record show an absolute dismissal, and that the opinion in this case shows the bill was not dismissed upon the merits, but only because of his (complainant's) laches in seeking the aid of a court of equity to set aside and cancel the written assignment made by the defendant herein to the plaintiff, and which, as the defendant alleges, was procured by fraud; that when relief was denied on the ground of such laches, the only effect of the denial and the consequent dismissal of the bill was to leave the complainant at full liberty to fight out the issue of fraud in this action.

We do not think this is a correct statement of the case. Assuming that defendant is right in his contention that he can look at the opinion for the ground of dismissal, we think it appears therefrom that the bill was in truth dismissed upon its merits. The court really went into an elaborate examination of the status of the complainant in the equity case with reference to his claim of right to avail himself of the alleged fraud, not only in respect to his laches technically so called, but also with regard to his affirmative treatment of the defendant after he had, as this court decided, acquired full knowledge of all the facts which constituted what he claimed to be the fraud in the case. After he had acquired such knowledge, the complainant deliberately decided to, and did, procure the defendant's check for $15,000 or substitutes therefor which he had himself taken, (the consideration given complainant for the sale) to be cashed, and complainant used the money for his own purposes. Not only laches on the part of the complainant formed the bar to the maintenance of the equity suit, but, as the court held, it was his whole conduct relative to the transaction after it had been completed, and his affirmance of the contract that precluded any right on his part to recover for any alleged fraud. His right to recover at all, upon the facts as found by the court from the evidence, was passed upon and decided.

Some expressions may be found in the opinion tending to show that the court was proceeding upon the ground merely of the complainant's laches in failing to resort early enough to the court for relief. But an examination of the whole of the opinion will show that the court was not confining itself to any such narrow ground, and on the contrary was examining the whole conduct of complainant, both his omissions and his affirmative and positive acts, for the purpose of determining whether the complainant had any cause of action against the defendant. For the purpose of such examination we make copious extracts from that opinion. After a full statement of the case the opinion, as reported in 169 U. S. at page 196, proceeds as follows:

"The controverted issue arising from the foregoing unquestioned facts is this:

"Cummings claims that he did not derive knowledge of the fraud he complains of from the matters just stated; whilst Baker asserts that if the fraud in the purchase complained of by Cummings had existed, full knowledge thereof was conveyed to Cummings by the facts above stated, and that the silence of the latter and his inaction for years, and until Baker had made claim for money and stated his intention to dissolve partnership, not only establishes the want of foundation for Cummings' assertion that there was misrepresentation and fraud in the sale, but also makes clear the fact that the right to make such claim was barred, both by limitations and laches, when the demand of Cummings was actually preferred.

"It results from the foregoing that the facts as to the controverted matters are embraced in a narrow compass, and that the whole case really resolves itself into two issues: 1st. Does the proof establish that the pur-

chase and sale in question was as claimed by Cummings, or as asserted by Baker? In that question it necessarily embraced the further one of whether Cummings, at the time of the sale, had actual knowledge of the fraudulent representations claimed to have been made by Baker. This is, in terms, included, because it would be impossible in reason to declare that one had been deluded or deceived by misrepresentations into entering into a contract if he had actual knowledge when the contract was made that the alleged inducing representations were false. 2d. Conceding that Cummings was misled by the fraudulent representations of Baker as alleged, did he immediately after the sale, and before the collection by him of the cash consideration of the sale, discover that the representations were untrue, and thereby become aware that he had been grossly deceived and defrauded, and did he, with such knowledge, say nothing about the matter, collect the cash consideration, remain silent, and continue in partnership with Baker, occupying the same office for years, and only assert that he had been deceived when a dissolution of the partnership was threatened, and he was pressed to pay a sum which Baker claimed Cummings owed him? This latter inquiry assumes a twofold aspect, for although in the bill, in the opinions below, and in the argument at bar, the efficient misrepresentation, which it is asserted rendered the assignment void, was the fraudulent statement as to the sum of the fees on the claims then allowed and appropropriated for, nevertheless it is also, as we have seen, asserted in the bill and contended in argument that there was a misrepresentation as to the pending claims not yet acted upon by the department, and which were then unappropriated for by Congress.

"We will defer an examination of the testimony as to the existence of the fraud and misrepresentation complained of until we have passed on the charge that, if there was fraud and misrepresentation, Cummings had full knowledge thereof immediately after the sale. We adopt this order of consideration because if it be found that such was the case, the question whether the fraud originally existed will become immaterial, in view of the defenses of limitation and laches. Moreover, in reviewing the question of knowledge, we will do so in the order stated, that is, first, discovery of the alleged fraud and misrepresentation as to the amount of fees collected and in process of collection from claims appropriated for at the time of the sale; and, second, discovery of the misrepresentation as to the amount of pending claims from which further fees were expected. Here, also, it is to be premised that if the first proposition be found to be well taken, an examination of the second will be wholly unnecessary. This, obviously, is the case, for as the statute of limitations began to run from the time when suit might have been brought to annul the sale, it results that the discovery of the falsity of *any* material and fraudulent representation by which the sale had been induced, gave rise to the right to commence an action to rescind, and therefore fixed the period when the statute of limitations commenced its course."

And again on page 206:

"Our conclusion is, that the evidence not only clearly but beyond all question or dispute overwhelmingly shows that if the false representations as to the earned fees were made as alleged, there was entire knowledge thereof by Cummings. And, for reasons heretofore stated, this conclusion renders unnecessary any inquiry into the question of when Cummings dis-

covered the falsity of the alleged representations as to the amount of pending claims. . . . That Cummings might at his election have pursued a remedy for the alleged fraud in a court of law is obvious. And it is equally clear that such remedy at law, by action on the case predicated on the facts as to deceit and fraud, which are alleged in the bill now before us, would have been barred in three years from the discovery of the fraud under the Statute of Limitations of Maryland of 1715, c. 23, s. 2, in force in the District of Columbia. (1 Kilty's Statutes, 111; Comp. Laws Dist. Col. c. 42, s. 6, p. 360.) It hence follows, irrespective of the equitable doctrine of laches, that the relief which the bill seeks to obtain ought not to be allowed by a court of equity.

"Apart, however, from the bar of the statute of limitations, the facts as to the full knowledge of the fraud, if any existed, by Cummings more than three years before the filing of his bill, and his conduct after he obtained it, his permitting Baker to go on and prosecute the claims as if they were his own, debars Cummings from invoking a court of conscience to put him in a much better position than he could possibly have occupied if he had spoken and asserted his rights in due season.

"There cannot be a doubt that the right existed in Baker to have dissolved the partnership at any time. If this right on his part had been exercised, Cummings would not have been in a position to have availed himself of the labors of Baker in prosecuting the future claims to a successful culmination, and would not therefore have been a participant in the profits arising therefrom. If with a full knowledge of the fraud Cummings chose to remain silent, to permit Baker to go on with the prosecution of the claims, to incur the expenditure of time and labor not only in the cases in which he was successful but in the cases in which he failed, Cummings cannot in conscience be allowed to reap the rewards which he could not possibly have obtained had he spoken with reasonable promptness, when the knowledge of the fraud, if it existed, was brought home to him in the most pointed and unequivocal way."

And the court winds up the opinion with the following remark:

"Because we rest our conclusions upon the application of the bar of the statute and the laches of Cummings, we must not be considered as intimating that we conclude that there was either clear and convincing proof, or even a preponderance of proof, that the sale was as claimed by Cummings."

From this last extract it seems to be clear that the court had in fact examined the evidence as to the alleged fraud and had concluded it was not proved. The result of the whole opinion is to say in substance that while we have read the evidence in the case and do not think there is even a preponderance of it in favor of a finding of fraud, yet notwithstanding that fact we will place our judgment upon the ground that the evidence shows the complainant has himself so acted in the case, both by his neglect and, among other things, by his drawing the money on the check, that he has affirmed the contract after he knew all the facts upon which he now founds his allegation of fraud; that he has waived the fraud and all benefit that he might otherwise have urged by reason of it. A waiver of all

right to question the validity of a contract may be founded upon the claiming and acceptance of a benefit under it after full knowledge of all the facts. (2 Pom. Eq. Juris. 2d ed. sec. 897, and cases cited in note 1.) From all this we think no other conclusion is accurate than to say the decision of this court was based upon the merits of the case within the meaning of that expression when used to distinguish a decision of the court upon the merits from a decision based upon a lack of jurisdiction or defect of parties or anything of that nature. Here there was no lack of jurisdiction, the parties were before the court, and full power to grant relief entirely commensurate with the plaintiff's rights existed in the court. It is therefore incorrect to say that by the dismissal of the complainant's bill he has simply been remitted to his less effective remedy at law. This is to ignore the weight and effect of the opinion upon the matters just discussed and to open for another contention a subject which we think the decree in the equity case has closed for all time. It cannot be that after the determination of an investigation such as has been had in the equity case, and the entry of a decree thereon dismissing the bill, that the matter can again be opened for contest in this action at law.

For these reasons, we think the judgment of the Court of Appeals of the District of Columbia should be reversed and the case remanded to that court with instructions to reinstate the judgment of the Supreme Court of the District in favor of the plaintiff.

So ordered.

Mr. Justice BREWER did not hear the argument and took no part in the decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.